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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and authorities involved	2
Statement	2
Specification of errors to be urged	5
Summary of argument	5
Argument:	
I. The petition for a writ of certiorari was filed within the time allowed by law	9
II. The cash received by taxpayer in the recapitalization of Abercrombie & Fitch Company is taxable as a dividend	22
A. Abercrombie & Fitch Company had earnings and profits available for distribution in January 1937, in excess of the cash distributed at that time	23
B. Under Section 112 (c) (2), a cash distribution not in excess of available earnings and profits has the effect of a distribution of a taxable dividend	32
C. The distribution was not a partial liquidation but, even if it were, the tax would not be less than that determined by the Tax Court	48
Conclusion	60
Appendix A:	
1. Authorities on the jurisdictional question	61
2. Statutes and regulations involved in the question on the merits	63
Appendix B:	
1. Letter from taxpayer's counsel to the Clerk of the Circuit Court of Appeals for the Second Circuit, dated January 15, 1945	71
2. Letter from the Clerk to taxpayer's counsel, dated January 15, 1945	72
3. Letter from the Solicitor General to the Clerk, dated January 20, 1945	73
4. Letter from the Clerk to the Solicitor General, dated January 23, 1945	74
5. Letter from taxpayer's counsel to the Clerk, dated January 29, 1945	78

630742—45——1

Appendix B—Continued. Page

6. Letter from the Clerk to taxpayer's counsel, dated January 31, 1945 80
7. Letter from taxpayer's counsel to the Clerk, dated February 3, 1945 81
8. Letter from the Clerk to taxpayer's counsel, dated February 6, 1945 83

Appendix C:

1. Letter from the Solicitor General to the clerks 84
2. Summary of the clerks' replies 85

CITATIONS

Cases:

American Gypsum Co. v. *Commissioner*, decided March 29, 1944 26
Amsinck, G., & Co. v. *Springfield Grocer Co.*, 7 F. 2d 855 18
Angelus Milling Co. v. *Nunan*, No. 610, this Term 20
Beretta v. *Commissioner*, 141 F. 2d 452, certiorari denied, October 9, 1944 26
Brown v. *Commissioner*, 79 F. 2d 73 ..... 39, 43
Byron Sash & Door Co. v. *United States*, decided April 10, 1944 26
Campbell v. *United States*, 144 F. 2d 177 35
Century Electric Co. v. *Commissioner*, 144 F. 2d 983 20
Chapman Price Steel Co. v. *Commissioner*, decided December 15, 1944 26
Commissioner v. *Champion*, 78 F. 2d 513 43
Commissioner v. *Estate of Shamberg*, No. 707, certiorari denied, January 2, 1945 20
Commissioner v. *Estate of White*, No. 708, certiorari denied, January 2, 1945 20
Commissioner v. *Food Industries*, 101 F. 2d 748 54
Commissioner v. *Forhan R. Corp.*, 75 F. 2d 268 ..... 35, 40
Commissioner v. *Kolb*, 100 F. 2d 920 54
Commissioner v. *Owens*, 69 F. 2d 597 ..... 35, 53
Commissioner v. *Quackenbos*, 78 F. 2d 156 ..... 30, 31, 36
Commissioner v. *Scottish American Inv. Co.*, decided December 4, 1944 43
DeNobili Cigar Co. v. *Commissioner*, 143 F. 2d 436 ..... 30, 31
Dept. of Banking v. *Pink*, 317 U. S. 264 ..... 21, 22
Dobson v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231 ..... 43, 52
Eisner v. *Macomber*, 252 U. S. 189 ..... 24, 28
Equitable Society v. *Commissioner*, 321 U. S. 560 20
Flanagan v. *Helvering*, 116 F. 2d 937 ..... 38, 45
Foster v. *United States*, 303 U. S. 118, rehearing denied, 303 U. S. 667 ..... 49, 56, 57, 59
Fox v. *Harrison*, decided November 18, 1944 43
Goldstone v. *United States*, No. 699, this Term 20

Cases—Continued. Page

Gregory v. *Helvering*, 293 U. S. 465 41
Hammans v. *Commissioner*, 121 F. 2d 4 ..... 51, 52
Hazleton Corp. v. *Commissioner*, 36 B. T. A. 908 ..... 35, 53
Hellmich v. *Hellman*, 276 U. S. 233 58
Helvering v. *Credit Alliance Co.*, 316 U. S. 107 ..... 41, 59
Helvering v. *Griffiths*, 318 U. S. 371 ..... 20, 24
Helvering v. *Jarvis*, 123 F. 2d 742 59
Helvering v. *Leary*, 93 F. 2d 826 53
Helvering v. *Lerner Stores Co.*, 314 U. S. 463 19
Helvering v. *Schoellkopf*, 100 F. 2d 415 54
Henritze v. *Commissioner*, 28 B. T. A. 1173 35
Hill v. *Commissioner*, 66 F. 2d 45 39
Hirsch v. *Commissioner*, 124 F. 2d 24 ..... 38, 43, 45
Horrmann v. *Commissioner*, 34 B. T. A. 1178 28
Hurley Mercantile Co., In re, 56 F. 2d 1023, certiorari denied *sub. nom. Atascosa County State Bank* v. *Coppard*, 286 U. S. 555 12
Hyman v. *Helvering*, 71 F. 2d 342, certiorari denied, 293 U. S. 570 ..... 37, 40, 43
International Standard Electric Co. v. *Commissioner*, Nos. 739–740, certiorari denied, January 29, 1945 20
Kelly v. *Commissioner*, 97 F. 2d 915 52
Knapp Monarch Co. v. *Commissioner*, 1 T. C. 59, affirmed, 139 F. 2d 863 ..... 36, 53
Levit v. *Commissioner*, 43 B. T. A. 1077, petition for review dismissed *sub nom. Clayburgh* v. *Commissioner*, 122 F. 2d 411 39
Love v. *Commissioner*, 113 F. 2d 236 ..... 35, 53
McCord v. *Commissioner*, 31 B. T. A. 342 ..... 28, 36, 46
McGuire v. *Commissioner*, 84 F. 2d 431, certiorari denied, 299 U. S. 591 ..... 39, 43
Malone v. *Commissioner*, 128 F. 2d 967 52
Monarch Brewing Co. v. *George J. Meyer Mfg Co.*, 130 F. 2d 582 15
Morgan, Ex parte, 114 U. S. 474 ..... 12, 19
New York, State of v. *United States*, No. 83, this Term
Nolde v. *United States*, 64 C. Cls. 204, certiorari denied, 276 U. S. 634 ..... 28, 31
Parker v. *United States*, 88 F. 2d 907 39
Patty v. *Helvering*, 98 F. 2d 717 ..... 28, 30, 31, 36, 38, 39
Polleys v. *Black River Co.*, 113 U. S. 81 12
Puget Sound Co. v. *King County*, 264 U. S. 22 18
Randolph v. *Commissioner*, 76 F. 2d 472 39
Robinson v. *Commissioner*, 69 F. 2d 972 40
Rogers v. *Hill*, 289 U. S. 582 13
Rose v. *Little Inv. Co.*, 86 F. 2d 50 35
Rubber Co. v. *Goodyear*, 6 Wall. 153 14

Cases—Continued. Page

Santa Rita, The, 281 Fed. 760, certiorari denied, 260 U. S. 735 18
Silsby v. *Foote*, 20 How. 290 14
Smith v. *Shaughnessy*, 318 U. S. 176 20
Smith v. *United States*, 121 F. 2d 692 ..... 38, 43
Strassburger v. *Commissioner*, 318 U. S. 604 20
United States v. *Hark*, 320 U. S. 531 ..... 12, 16, 18
United States v. *Midstate Co.*, 306 U. S. 161 ..... 15, 17
United States v. *New York*, 315 U. S. 510 19
United States v. *Rayburn*, 91 F. 2d 162 ..... 12, 14
United States v. *Resnick*, 299 U. S. 207 17
Van Norman Co. v. *Welch*, 141 F. 2d 99 26
Vesper Co. v. *Commissioner*, 131 F. 2d 200 ..... 38, 43, 45, 47
Walker v. *Hopkins*, 12 F. 2d 262, certiorari denied, 271 U. S. 687 ..... 27, 31
Washington, The, 16 F. 2d 206 12
Weingarten, J., Inc. v. *Commissioner*, 44 B. T. A. 798 36
Wellhouse v. *Commissioner*, 3 T. C. 363 41
Wilcox v. *Commissioner*, 137 F. 2d 136 45
Woodard v. *Commissioner*, 30 B. T. A. 1216 ..... 35, 53
Woodward v. *Commissioner*, 23 B. T. A. 1259 35
Wright v. *Gibson*, 128 F. 2d 865 14
Young, F. J., Corp. v. *Commissioner*, 35 B. T. A. 860, affirmed, 103 F. 2d 137 28

Constitution and Statutes:
Constitution of the United States, Sixteenth Amendment 20
Judicial Code, Sec. 237 (28 U. S. C. 344) 21
Revenue Act of 1921, c. 136, 42 Stat. 227, Sec. 201 37
Revenue Act of 1924, c. 234, 43 Stat. 253, Sec. 203 ..... 27, 33
Act of February 13, 1925, c. 229, 43 Stat. 936, Sec. 8 (28 U. S. C. 350) 11, 61
Revenue Act of 1926, c. 27, 44 Stat. 9:
Sec. 201 37
Sec. 203 27
Revenue Act of 1928, c. 852, 45 Stat. 791:
Sec. 112 27
Sec. 115 ..... 24, 29, 57
Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 112 27
Revenue Act of 1934, c. 277, 48 Stat. 680, Sec. 115 ..... 25, 27
Revenue Act of 1936, c. 690, 49 Stat. 1648:
Sec. 111 ..... 55, 63
Sec. 112 ..... 7, 8, 22, 23, 32, 33, 40, 41, 42, 44, 46, 47, 53, 55, 56, 58, 63
Sec. 115 ..... 7, 9, 23, 24, 25, 26, 28, 29, 30, 31, 40, 42, 45, 48, 49, 50, 54, 56, 57, 58, 60, 65
Sec. 117 ..... 55, 68

Miscellaneous:

	Page
Darrell, *Corporate Liquidations and the Federal Income Tax*, 89 U. of Pa. L. Rev. (1941) 907, fn. 43, 912–914	39
1 Freeman, *Judgments* (fifth ed.), Sec. 3	18
H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 30 (1939–1 Cum. Bull. (Part 2) 361–362)	37
H. Rep. No. 179, 68th Cong., 1st Sess., pp. 14–15 (1939–1 Cum. Bull. (Part 2) 241, 252)	33, 40
House Ways and Means Subcommittee Report on the Revenue Bill of 1936, dated March 26, 1936, 74th Cong., 2d Sess., p. 6	57
1 Mertens, *Law of Federal Income Taxation* (1942), Sec. 9.47	26, 31
1 Paul & Mertens, *Law of Federal Income Taxation* (1934), 356–357	26
Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (1936), Sec. 384	19
Rudick, *"Dividends" and "Earnings or Profits" under the Income Tax Law: Corporate Non-Liquidating Distributions*, 89 U. of Pa. L. Rev. (1941) 865, 878, 897–898	26
Rules of the Circuit Court of Appeals for the Second Circuit, Rule 30	15, 18, 61
S. Rep. No. 398, 68th Cong., 1st Sess., p. 15 (1939–1 Cum. Bull. (Part 2) 266, 277)	34
S. Rep. No. 2156, 74th Cong., 2d Sess., p. 19 (1939–1 Cum. Bull (Part 2) 678, 690)	28
Treasury Regulations 86, Art. 115–10	28
Treasury Regulations 94, Art. 115–11	25, 68
Treasury Regulations 101, Art. 115–11	25
Treasury Regulations 103, Sec. 19.115–11	25
Treasury Regulations 111, Sec. 29.115–11	25

In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 710

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

v.

ESTATE OF EDWARD T. BEDFORD, TITLE GUARANTEE AND TRUST COMPANY, EXECUTOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Tax Court (R. 38–42) is reported at 1 T. C. 478. The opinion of the Circuit Court of Appeals (R. 48–51) is reported at 144 F. 2d 272.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 29, 1944 (R. 51–52). The petition for a writ of certiorari was filed on November 29, 1944, and was granted on January

8, 1945 (R. 52). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. The question as to the Court's jurisdiction, raised by the respondent, is discussed, *infra,* pp. 9–22, as requested by the Court in the order granting certiorari (R. 52).

QUESTIONS PRESENTED

1. Whether the petition for a writ of certiorari was filed within three months after entry of the judgment of the Circuit Court of Appeals as required by Section 8 of the Act of February 13, 1925, c. 229, 43 Stat. 940.

2. Whether so much of the cash received by the taxpayer in an exchange of old stock for new stock and cash pursuant to a plan of reorganization of Abercrombie & Fitch Company as equals the gain recognized on the transaction under Section 112 (c) (1) of the Revenue Act of 1936 was paid out of earnings and had the effect of a taxable dividend, so that it is to be taxed as a dividend as provided in Section 112 (c) (2).

STATUTES AND AUTHORITIES INVOLVED

The applicable statutes and authorities are set out in Appendix A, *infra,* pp. 61–70.

STATEMENT

The following are the relevant facts as stipulated (R. 8–37) and as stated by the Tax Court (R. 38–39):

Edward T. Bedford died on May 21, 1931. The Title Guarantee & Trust Company is the executor of his estate. (R. 8, 38.)

Among Bedford's assets were 3,000 shares of 7% cumulative preferred stock, par value $100, of Abercrombie & Fitch Company, which had a fair market value on the date of his death of $210,000. In January, 1937, pursuant to a plan of recapitalization of Abercrombie & Fitch Company, the executor exchanged the 3,000 shares of 7% preferred stock for 3,500 shares of $6 cumulative preferred stock, par value $75, 1,500 shares of common stock, par value $1, and a cash distribution of $45,240 computed at the rate of $15.08 on each of the old preferred shares. The stock and cash so received had a fair market value of $349,740 and the gain on the exchange was $139,740. (R. 8–9, 38–39.)

On January 31, 1936, the books of Abercrombie & Fitch Company showed a deficit in surplus account of $399,771.87, after deduction of three stock dividends totaling $844,100, paid in 1920, 1928, and 1930.[1] For its fiscal year ended January 31, 1937, the company had net earnings of $309,073.70 after taxes. (R. 9, 39.)

The parties agreed before the Tax Court that the recapitalization of Abercrombie & Fitch Company constituted a reorganization as defined in

[1] These stock dividends were all non-taxable to the distributees, as will be shown, *infra*, p. 24, note 13.

Section 112 (g) of the Revenue Act of 1936;[2] and that the gain of $139,740 on the exchange of old stock for new stock and cash was recognized for tax purposes only to the extent of the cash received, or $45,240, under the provisions of Section 112 (b) (3) and (c) (1). The taxpayer contended, however, that the cash distribution represented a capital gain, only 40% of which was taxable under the provisions of Section 117 (a). (R. 38, 39.) The Commissioner determined that the cash distribution had the effect of a taxable dividend and was to be taxed as a dividend, as provided in Section 112 (c) (2) (R. 5–6, 38).

The Tax Court held (R. 40–42) that the distribution of $45,240 in cash was made out of the accumulated earnings and profits of Abercrombie & Fitch Company and had the effect of a taxable dividend, even though it was not in form a dividend. It therefore sustained the Commissioner's determination that the cash distribution was taxable as a dividend under the provisions of Section 112 (c) (2).

The Circuit Court of Appeals reversed (R. 49–51), holding, first, that the Abercrombie & Fitch Company had no accumulated earnings and profits out of which the cash distribution of $45,240 might have been taken because the

[2] Subsequent references are to the Revenue Act of 1936 unless otherwise indicated. All the sections of the Revenue Act of 1936 referred to in the brief will be found in Appendix A, *infra*.

stock dividends which had been paid in prior years had converted the earnings into capital; second, that the distribution was not governed by Section 112 (c) (2), but was instead a liquidating dividend governed by Section 115; and, third, that the distribution was properly chargeable to capital account, even though the company may have had accumulated earnings.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that earlier non-taxable stock dividends had converted earnings into capital with the consequence that the Abercrombie & Fitch Company had no undistributed earnings in the taxable year.

2. In holding that the cash distribution did not have the effect of a taxable dividend because Section 115 (g) should be read as a gloss upon Section 112 (c) (2).

3. In holding that the distribution was governed by Section 115 instead of Section 112 (c) (2) and hence was a liquidating dividend.

4. In holding that, as a part of a liquidating dividend, the cash distribution is properly chargeable to capital account.

SUMMARY OF ARGUMENT

I

The petition for a writ of certiorari was filed within three months after entry, on August 29,

1944, of the judgment order of the lower court and hence was filed within the time allowed by law. Although it was labeled "order for mandate", the order of August 29, 1944, formally rendered judgment as of its date, and further provided that a mandate issue in accordance with "this decree". The opinion of the court did not constitute its judgment; it merely stated the conclusion reached by the court with respect to the case and gave reasons therefor. Even if the conclusion stated in the opinion could be considered as the judgment in the absence of a further order, the subsequent formal order is the final judgment and is given effect as such for purposes of computing the time in which to petition for certiorari. It is the practice in the Second Circuit to enter a formal order for mandate as was done in this case, and this order is intended as the judgment. The order in this case was prepared and signed by the Clerk pursuant to authority delegated to him by the court, and in legal effect it was the act of the court.

Applications for a writ of certiorari in the past have been made and granted on the understanding that the order for mandate constituted the court's judgment. This long-accepted practice does not result in giving a longer period in which to petition for certiorari in cases from the Second Circuit than that allowed with respect to cases from other circuits. The period is three months

from entry of judgment in the Second Circuit, as well as in other circuits.

II

The gain realized by the taxpayer in 1937 upon an exchange of old stock for new stock and cash, pursuant to a plan of recapitalization, is recognized under the statute only to the extent of the cash distribution. If the cash distribution was not in excess of the accumulated earnings and profits, it had the effect of a taxable dividend and is to be taxed as a dividend under the provisions of Section 112 (c) (2) of the Revenue Act of 1936.

The recapitalized corporation had accumulated earnings and profits in excess of the cash distribution. Although the books of the corporation showed a deficit in surplus account at the time of the distribution, the deficit resulted in part from the reduction of surplus by three stock dividends which were non-taxable to the distributees. Section 115 (h) prescribes that a distribution at any time of a non-taxable stock dividend shall not be considered a distribution of earnings and profits. This is the rule followed by the great weight of authority, both prior and subsequent to the enactment of Section 115 (h). The amounts of earnings charged to surplus upon issuance of the stock dividends are therefore to be treated as undistributed earnings and profits available for distribution in 1937.

The test of whether a distribution has the effect of a distribution of a taxable dividend under Section 112 (c) (2) is the existence of earnings and profits, and not the bona fides of the transaction. Since Section 112 (c) (2) applies only in the case of distributions pursuant to a statutory reorganization, its scope can not be limited to tax avoidance devices; such devices do not qualify as statutory reorganizations. Nor does the circumstance that the capitalization of the corporation was reduced in the transaction preclude treatment of the distribution as a taxable dividend. The Tax Court's finding that the distribution had the effect of a taxable dividend is fully supported and should have been accepted by the Circuit Court of Appeals.

The distribution of new stock and cash in exchange for the old stock is not within the statutory definition of a distribution in partial liquidation because all, and not merely a part, of the old stock was retired. But even if it be assumed that the distribution, standing alone, falls literally within the definition of a partial liquidation, the distribution was merely a step in a reorganization. Where a reorganization is involved, the provisions of the statute relating to reorganizations control the method of taxing the distribution made pursuant thereto.

However, if the view of the lower court that the distribution was one in partial liquidation be accepted, the gain on the exchange is, under the

provisions of Section 115 (c), taxable in full. The tax is thus no less than it would be were the gain taxed as a dividend under Section 112 (c) (2). The question of whether the distribution was properly chargeable to capital account is irrelevant to this question. The taxpayer as a stockholder is to be taxed on its entire gain, after recovery of its capital base, on the liquidating exchange, regardless of whether the distribution be charged by the corporation to earnings and profits or to capital account.

ARGUMENT

I

THE PETITION FOR A WRIT OF CERTIORARI WAS FILED WITHIN THE TIME ALLOWED BY LAW

On August 8, 1944, the court below filed its opinion in which it stated its reasons for reversing the decision of the Tax Court and concluded with the sentence, "The order of the Tax Court is reversed" (R. 51). On the same day, the Clerk made the following docket entry: "Order reversed, A. N. Hand, C. J" (See Br. in Opp. 17).

On August 29, 1944, the following order, labeled "Order for Mandate", was filed (R. 51–52):

> At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of August, one thousand nine

hundred and forty-four, Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges. Estate of Edward T. Bedford, Title Guarantee & Trust Company, Petitioner v. Commissioner of Internal Revenue, Respondent. Appeal from The Tax Court of the United States.

This cause came on to be heard on the transcript of record from The Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed.

It is further ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this decree.

ALEXANDER M. BELL,
Clerk.

By A. DANIEL FUSARO,
Deputy Clerk.

United States Circuit Court of Appeals, Second Circuit. Estate of Edward T. Bedford etc., v. Commissioner of Internal Revenue. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Aug. 29, 1944. Alexander M. Bell, Clerk.

On the same day the Clerk made two separate entries as follows (Br. in Opp. 17):

Filed order for mandate.

Issued mandate.

On November 29, 1944, the Solicitor General filed the petition for a writ of certiorari. In its brief in opposition, the taxpayer argued that this Court has no jurisdiction because the petition was not filed within three months after the entry of the judgment or decree of the lower court, as prescribed by Section 8 (a) of the Act of February 13, 1925 (Appendix A, *infra* p. 61). In the order granting certiorari, this Court requested that the parties discuss in their briefs and on oral argument the question whether the application for certiorari was within the time provided by law (R. 52).

Resolution of the question as to whether the petition for certiorari was timely under Section 8 (a) of the Act of February 13, 1925, turns on a determination of what constitutes the judgment or decree of the lower court. The taxpayer appears to contend that the concluding sentence of the opinion constitutes the court's judgment. The Government submits that the "Order for Mandate" is the court's judgment. Since the petition for a writ of certiorari was filed within three months after the date on which the order for mandate was filed and entered on the docket, it was applied for within the time prescribed by the statute.[3]

[3] The time in which to petition for certiorari under the statute runs from "entry" of judgment. Here the order for mandate was filed, and the Clerk's docket entry of the order was made, both on August 29, 1944. It is unnecessary in this case, therefore, to decide which of these two events con-

The order for mandate (R. 51–52) shows on its face that it is the judgment or decree of the court and that it was so intended.[4] The order recites that "it is now hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed." It "further ordered" that a mandate issue in accordance with "this decree." (R. 51.) Thus the order formally rendered judgment as of its date. The terminology is that in which final judgments

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stitutes the entry of the judgment. It has been held, however, that the "entry" consists of the act of the Clerk in re-recording the court's judgment in an order or record book. See *Ex parte Morgan*, 114 U. S. 174, 175; *Polleys* v. *Black River Co.*, 113 U. S. 81, 84; *United States* v. *Rayburn*, 91 F. 2d 162, 164 (C. C. A. 8th); *The Washington*, 16 F. 2d 206 (C. C. A. 2d); cf. *In re Hurley Mercantile Co.*, 56 F. 2d 1023, 1025 (C. C. A. 5th), certiorari denied *sub nom. Atascosa County State Bank* v. *Coppard*, 286 U. S. 555, holding that a judgment is entered or rendered when filed with the Clerk.

[4] The label attached to the order is not determinative as to whether it constitutes the court's judgment. This Court has made that plain in *United States* v. *Hark*, 320 U. S. 531, 534, where it said:

"The judgment of a court is the judicial determination or sentence of the court upon a matter within its jurisdiction. No form of words and no peculiar formal act is necessary to evince its rendition or to mature the right of appeal. And the modes of evidencing the character of the judgment and of attesting the fact and time of its rendition vary from state to state according to local statute or custom, from a simple docket entry or the statement of a conclusion in an opinion, to a formal adjudication, signed by the judge or the clerk, in a journal or order book, or filed as part of the record in the case. The practice in federal courts doubtless varies because of the natural tendency to follow local state practice."

and decrees are customarily couched and the order referred to itself as "this decree." The fact that the order now hereby adjudges and decrees a reversal of the order of the Tax Court indicates that judgment had not previously been rendered. The direction for issuance of a mandate in accordance with "this decree" only confirms the conclusion that the order, and not some previous action of the court, was the effective judgment.[5]

In contrast, the opinion does not formally render judgment nor is the terminology like that used in final judgments. The last sentence of the opinion that the order of the Tax Court is reversed is one of the customary ways of concluding an opinion and would seem to be no more than a statement as to the conclusion reached with respect to the case. "The court's decision of a case is its judgment thereon. Its opinion is a statement of the reasons on which the judgment rests." *Rogers* v. *Hill*, 289 U. S. 582, 587. The court below obviously did not regard the opinion as its judgment; it later filed a formal order ren-

[5] The mandate itself was a separate order; as the docket entries of the Clerk for August 29, 1944, plainly show. It was an order addressed to the Tax Court, issued pursuant to the direction in the order for mandate. The taxpayer's argument (Br. in Opp. 7–8) that if the order for mandate is the judgment, there could be no stay of the mandate upon application for certiorari appears to confuse the order for mandate with the mandate itself. Since the mandate is a separate order, it could be stayed or recalled without disturbing the order for mandate containing the court's judgment.

dering judgment, which would have been only an empty form if judgment had already been entered.

Even if it be assumed *arguendo* that the concluding sentence of the opinion might without a further order have been treated as the judgment with respect to which a petition for certiorari might have been filed, the entry of a subsequent formal judgment is the last action of the court and therefore the operative and final judgment. This view is supported by *Rubber Co.* v. *Goodyear,* 6 Wall. 153. There an order was entered on the minute book on November 28, 1866, which was followed by a final decree on December 5, 1866, entered "as of Nov. 28, 1866." The Court said (pp. 155–156):

> We do not question that the first entry had all the essential elements of a final decree, and if it had been followed by no other action of the court, might very properly have been treated as such. But we must be governed by the obvious intent of the Circuit Court, apparent on the face of the proceedings. We must hold, therefore, the decree of the 5th of December to be the final decree.

See also *Silsby* v. *Foote,* 20 How. 290, 295, indicating that an appeal might be taken alternatively from the pronouncement and entry of a decision or from the subsequent settling and signing of the decree by the judge. Cf. *United States* v. *Rayburn,* 91 F. 2d 162 (C. C. A. 8th); *Wright* v.

Gibson, 128 F. 2d 865 (C. C. A. 9th); *Monarch Brewing Co.* v. *George J. Meyer Mfg Co.*, 130 F. 2d 582 (C. C. A. 9th). In this case, it will be noted that the petition for certiorari was filed with respect to the last "judgment", entered August 29, 1944. Cf, *United States* v. *Midstate Co.*, 306 U. S. 161, 163, footnote 2.

The conclusion that the order for mandate alone constitutes the court's judgment is confirmed by information as to the practice in the Second Circuit contained in a letter written by the Clerk of the Circuit Court of Appeals for the Second Circuit in reply to a letter of the Solicitor General, both of which are printed in Appendix B, *infra*, pp. 73–78.[6] From this it appears that the opinion was not considered as the court's judgment and that the docket entry made on August 8, 1944, to record the opinion, was not the entry of judgment but merely showed briefly how the court decided the case and who wrote the opinion. The Clerk's letter indicates further that it is the practice to enter judgments labeled orders for mandate, under paragraph 1 of Rule 30 of the lower court's rules (Appendix A, *infra*, pp. 61–62), at the expiration of fifteen days from the filing of the opinion, and that this time interval between the opinion and the judgment is observed pursuant to the express direction of the court. The provision of the rule

[6] Appendix B contains the entire correspondence between counsel in this case and the Clerk of the Circuit Court of Appeals for the Second Circuit.

that upon the filing of any decision the Clerk shall enter the proper order "forthwith, or at any later time, if the court thinks justice requires it" has thus been made definite by the court's instruction as to the time when the order is to be entered.[7] There was no departure from the usual practice (except that the interval between the dates of the opinion and judgment was 21 days) in this case and, in view of the information given by the Clerk, there can be no question that the court's judgment was entered on August 29, 1944.[8]

This Court has decided in comparable situations that a formal order, entered some days after the court's opinion was filed, constituted the final and appealable judgment. *United States* v. *Hark*, 320

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[7] In any event the Clerk's docket entry of August 8 does not constitute compliance with the rule that the proper "order" be entered forthwith, because the docket entry is in no sense an "order", proper or otherwise.

[8] The practice with respect to entry of judgments in the Second Circuit differs from that of the other circuit courts of appeals. In each of the other circuits a separate judgment order is prepared which is usually entered on the date on which the opinion is filed. For the information of the Court, there is attached as Appendix C, *infra*, pp. 85–88, a summary of the practice followed in the other circuits. This information was obtained from the clerk of each court by letter in response to a letter of the Solicitor General. The clerks' letters will be filed with the Clerk of this Court, so that they will be accessible if the Court should wish to examine them. The Solicitor General's letter to the Clerk of the United States Court of Appeals for the District of Columbia is also printed in Appendix C, *infra*, pp. 84–85, as a sample of the letters, all of which were worded identically, sent to the clerk of each circuit court of appeals with the exception of the Second Circuit.

U. S. 531, involved the question whether an appeal had been taken from the District Court under the Criminal Appeals Act within thirty days after the decision or judgment was rendered. The District Judge filed an opinion on March 5, 1943, concluding with the sentence "The motion to quash is granted." Subsequently, on March 31, at the request of the United States Attorney the District Judge signed a formal order quashing the indictment, although it was not the prevailing practice of that court to enter formal orders. This Court stated that where a formal judgment is signed by the judge, it is *prima facie* the decision or judgment, rather than a statement in an opinion or a docket entry. The Court stated further that it was unwilling to assume that the District Judge deemed the formal judgment an empty form and held that the formal order was the court's judgment. See also *United States* v. *Midstate Co.*, 306 U. S. 161, 163, footnote 2, where the same holding was made upon similar facts except that it was shown that the practice of the District Court was to enter formal judgments after the filing of an opinion.[9] The instant case

[9] Other cases in which a formal judgment, rather than an opinion or a statement in an opinion, has been treated as the court's judgment for purposes of computing the time in which an appeal may be taken are: *United States* v. *Resnick*, 299 U. S. 207 (In this case the opinion of the District Court concluded "* * * the Demurrer is therefore, sustained"; subsequently a formal order was entered sustaining the demurrer; the petition for appeal was not timely if the opinion

more closely resembles the *Midstate Co.* case than the *Hark* case, for the practice in the Second Circuit is to enter an "order for mandate" in every case; this order is intended to be the court's judgment. See letter from Clerk dated January 23, 1945 (Appendix B, *infra*, pp. 74–78).

The taxpayer argues that the *Hark* case is distinguishable on the ground that the formal order in that case was the act of the judge, whereas in the instant case the order for mandate was not the act of the court. But we think it plain that the order for mandate was the judgment of the court. The order on its face purports to be the act of the three judges designated therein, in whose name judgment is given. It is true that the order for mandate was signed by the Clerk rather than by the judges, but this does not justify the conclusion that the order was a mere ministerial act of the Clerk, as taxpayer argues. On the contrary, the order was entered pursuant to the authority given the Clerk in Rule 39, paragraph 1 (Appendix A, *infra*, pp. 61–62), as amplified by the instruction of the court as to the time for

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was the court's judgment; this Court postponed consideration of the question of jurisdiction, raised by motion to dismiss, to the hearing of the case on the merits; the court entertained the appeal and did not discuss the question of its timeliness in its opinion.); *Puget Sound Co.* v. *King County*, 264 U. S. 22; *G. Amsinck & Co.* v. *Springfield Grocer Co.*, 7 F. 2d 855 (C. C. A. 8th); *The Santa Rita*, 281 Fed. 760, 761 (C. C. A. 5th), certiorari denied, 260 U. S. 735. See also 1 Freeman, *Judgments* (fifth ed.), Sec. 3.

entry of the order. The order was therefore entered under powers delegated by the court to the Clerk, and in legal effect it was the act of the court.[10] Cf. *Ex parte Morgan*, 114 U. S. 174, 175.

Moreover, it is the general understanding, as the taxpayer concedes (Br. in Opp. 8), that the order for mandate is the judgment or decree of the Circuit Court of Appeals for the Second Circuit and that the time within which to apply for certiorari runs from the date of entry of that order by the Court. Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1936), Section 384. Indeed, so far as is known it has never before been argued in this Court that a petition for certiorari, filed within three months of the entry of the order for mandate in the Circuit Court of Appeals for the Second Circuit, was not timely. This Court has taken and decided numerous cases where the petition was filed more than three months after the date of the opinion but within three months after entry of the order for mandate. Among such cases selected from recent terms are *Helvering* v. *Lerner Stores Co.*, 314 U. S. 463; *United States* v. *New York*, 315

[10] It may be noted that in the Circuit Courts of Appeals for the First, Eighth and Tenth Circuits, the Clerk prepares and signs the judgment orders pursuant to the authority delegated to him by the court (although in the First Circuit the judgment is initialed by the Senior Circuit Judge). Whether the judgment order is signed by the court or the Clerk in the Fifth, Seventh, and Ninth Circuits does not appear. See Appendix C, *infra*, pp. 85–88.

U. S. 510; and *Strassburger* v. *Commissioner*, 318 U. S. 604, wherein this Court reversed the judgment of the Circuit Court of Appeals for the Second Circuit without reference to the fact that the petitions for certiorari were filed too late if the entry of the court's opinion constituted entry of its judgment.[11] Acceptance of the taxpayer's contention here would mean that this Court had no jurisdiction in the foregoing cases and in the many other cases which could be cited.

Treatment of the order for mandate as the judgment does not result in giving a longer period in which to petition for certiorari in cases decided by the Second Circuit over the period allowed in cases decided by other circuits, as

[11] In other cases involving the same situation with respect to the filing of the petition for certiorari, the Court has affirmed the judgment below. See, e. g., *Equitable Society* v. *Commissioner*, 321 U. S. 560; *Helvering* v. *Griffiths*, 318 U. S. 371; *Smith* v. *Shaughnessy*, 318 U. S. 176.

During this term the Court has granted certiorari and has heard argument in *State of New York* v. *United States*, No. 83, although the petition for certiorari was filed more than three months after the date of the opinion but within three months of the order for mandate. The situation was the same in *Angelus Milling Co.* v. *Nunan*, No. 610, and *Goldstone* v. *United States*, No. 699, in which certiorari was granted this term. During this term also, the Court has denied certiorari in several cases from the Second Circuit without reference to the fact that the petitions were filed too late if the entry of the court's opinion is taken as the judgment. See *Commissioner* v. *Estate of Shamberg*, No. 707, and *Commissioner* v. *Estate of White*, No. 708, certiorari denied, January 2, 1945; *International Standard Electric Co.* v. *Commissioner*, Nos. 739–740, certiorari denied, January 29, 1945.

taxpayer suggests. On the contrary, the time in which to apply for certiorari with respect to judgments of the Second Circuit is the same as for other circuits, namely, three months from entry of judgment. It is true that the period in which to apply for certiorari in Second Circuit cases is more than three months after entry of the opinion, whereas in other circuits the period generally is only three months from the date of the opinion, due to the fact that entry of judgment coincides with the date of the opinion. This fact, is however, irrelevant, because the statute prescribes the date on which "judgment" is entered as the date from which the period in which to petition for certiorari is to be computed, and the statute does not require that the judgment be entered at any particular time.

In *Dept. of Banking* v. *Pink*, 317 U. S. 264, cited by taxpayer, this Court's view was simply that the time in which to apply for certiorari begins to run from the time of entry of judgment by the Court of Appeals of New York rather than from the time when a lower court enters judgment on the remittitur of the Court of Appeals. This was in conformity with the statute governing appeals from state courts and with the rule applied to cases from other state courts.[12]

[12] Section 237 of the Judicial Code (28 U. S. C. 344) provides for an appeal from "A final judgment or decree in any suit *in the highest court of a State* * * *." (Italics supplied.)

The case is not apposite here, however, because this case does not involve the question as to whether the judgment of the Circuit Court of Appeals or the decision of the Tax Court on mandate is the appealable judgment. Furthermore, there is nothing in the opinion in *Dept. of Banking* v. *Pink, supra,* to support the view that the lower court's opinion should be treated as its judgment.

II

THE CASH RECEIVED BY TAXPAYER IN THE RECAPITALIZATION OF ABERCROMBIE & FITCH COMPANY IS TAXABLE AS A DIVIDEND

The taxpayer, in January, 1937, exchanged old preferred stock of Abercrombie & Fitch Company owned by it for new preferred stock and new common stock in the same company and $45,240 in cash. The old stock had a cost basis to the estate of $210,000. The new stock and cash received had a fair market value on the date of the exchange of $349,740. (R. 38.) Thus the estate realized an actual gain on the exchange of $139,740. The parties are agreed, however, that the exchange of stock for stock was made pursuant to a plan for recapitalization and hence was a statutory reorganization (see Section 112 (g) of the Revenue Act of 1936, as amended, Appendix A, *infra,* pp. 64–65), and further, that under Section 112 (b) (3) and (c) (Appendix A, *infra,* pp. 63–64) the gain on the exchange is not recog-

nized for tax purposes except in an amount not in excess of the cash involved, or $45,240.

The controversy relates only to the manner in which this gain shall be taxed under Section 112 (c). The taxpayer contends that only the provisions of Section 112 (c) (1) apply and that the amount of $45,240 is taxable thereunder as a capital gain. The Government contends, however, that, as the Tax Court held, the provisions of Section 112 (c) (2) apply to the facts here, that the corporation had earnings and profits available to cover the cash distribution, and that Section 112 (c) (2) requires that the total recognized gain be taxed as a dividend. Further, the Government contends that the court below incorrectly held that the distribution was taxable under Section 115 (c) and (i) (Appendix A, *infra*, pp. 67–68) as a distribution in partial liquidation, and improperly failed to hold that if it were, 100% of the gain would be taxable.

A. *Abercrombie & Fitch Company had earnings and profits available for distribution in January 1937, in excess of the cash distributed at that time.*—For the period from January 1, 1913, to January 31, 1936, Abercrombie & Fitch Company had net earnings, which were credited to surplus account, in the amount of $2,443,123.50, and during the same period it paid cash dividends totaling $1,208,325.05. On January 31, 1936, as a result of other debits and credits, its books showed a deficit in surplus account of $399,771.87.

Among the debits to surplus which contributed to the creation of this deficit were three stock dividends totaling $844,100 paid in 1920, 1928, and 1930. (R. 37.) None of these dividends were taxable in the hands of the distributee.[13]

Section 115 (h) (Appendix A, *infra*, p. 67) prescribes in the clearest possible manner that the distribution by a corporation of a stock dividend which is not taxed as income to the recipient does not serve to diminish corporate earnings or profits. The Section provides:

> (h) *Effect on Earnings and Profits of Distributions of Stock.*—The distribution (whether before January 1, 1936, or on or after such date) to a distributee by or on behalf of a corporation of its stock or securities or stock or securities in another corporation shall not be considered a distribution of earnings or profits of any corporation—

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[13] The stock dividend of $161,700 paid in common stock on the common stock on April 30, 1920, was not taxable under the rule of *Eisner* v. *Macomber*, 252 U. S. 189, and *Helvering* v. *Griffiths*, 318 U. S. 371. The stock dividends of $323,400 and $359,000 issued in 1928 and 1930, respectively, were paid in preferred stock on the common stock and were nontaxable under Section 115 (f) of the Revenue Act of 1928, c. 852, 45 Stat. 791, providing that "A stock dividend shall not be subject to tax."

The Tax Court held that the stock dividends were nontaxable in the hands of the distributees and this holding is not in issue, since the taxpayer assigned no error with respect to it in the Circuit Court of Appeals (R. 45–46).

(1) if no gain to such distributee from the receipt of such stock or securities was recognized by law, or

(2) if the distribution was not subject to tax in the hands of such distributee because it did not constitute income to him within the meaning of the Sixteenth Amendment to the Constitution or because exempt to him under section 115 (f) of the Revenue Act of 1934 or a corresponding provision of a prior Revenue Act.

The language of Section 115 (h) is plain. It refers *inter alia* to a distribution by a corporation of its own stock and securities, whether before or after January 1, 1936. It provides that a stock dividend shall not be considered as a distribution of earnings or profits; that is, that tax-wise it does not affect earnings or profits but leaves them intact for future distribution; if the distribution is non-taxable under the Sixteenth Amendment or under express provisions of Section 115 (f) of the Revenue Act of 1934 or corresponding provisions of some of the earlier statutes which exempted from tax all stock dividends. See Article 115–11, Treasury Regulations 94, promulgated under the Revenue Act of 1936 (Appendix A, *infra* pp. 68–70); Article 115–11, Treasury Regulations 101, promulgated under the Revenue Act of 1938; Section 19.115–11, Treasury Regulations 103, and Section 29.115–11, Treasury Regulations 111,

both promulgated under the Internal Revenue Code.[14]

Many decisions of the lower courts support this construction. *Chapman Price Steel Co.* v. *Commissioner* (C. C. A. 7th), decided December 15, 1944; *Century Electric Co.* v. *Commissioner,* 144 F. 2d 983 (C. C. A. 8th); *Beretta* v. *Commissioner,* 141 F. 2d 452 (C. C. A. 5th), certiorari denied, October 9, 1944; *Van Norman Co.* v. *Welch,* 141 F. 2d 99 (C. C. A. 1st); *American Gypsum Co.* v. *Commissioner,* decided March 29, 1944 (1944 P-H Tax Court Memorandum Decisions Service, par. 44,094). To the same effect see 1 Mertens, *Law of Federal Income Taxation* (1942), Sec. 9.47; 1 Paul & Mertens, *Law of Federal Income Taxation,* (1934), 356–357; Rudick, *"Dividends" and "Earnings or Profits" Under the Income Tax Law: Corporate Non-Liquidating Distributions,* 89 U. of Pa. L. Rev. (1941) 865, 878, 897–898. Cf. *Byron Sash & Door Co.* v. *United States* (W. D. Ky.), decided April 10, 1944 (1944 P-H, par. 62,537), pending on review (C. C. A. 6th), in which no mention was made of Section 115 (h).

Moreover, while the language of Section 115 (h) relating to the effect on earnings of distributions of non-taxable stock dividends first appeared

[14] Section 115(h) was reenacted in the Revenue Act of 1938 and in the Internal Revenue Code in slightly amended form, but the amendments made have no relevance in this case.

in the Revenue Act of 1936,[15] its provisions in no respect represented a departure from existing principles. The Section merely states in explicit statutory language a conclusion already embodied in judicial decisions and administrative regulations. For example, in *Walker* v. *Hopkins*, 12 F. 2d 262 (C. C. A. 5th), certiorari denied, 271 U. S. 687, the court rejected the contention that a prior distribution of a stock dividend had distributed accumulated earnings so as to leave the corporation without sufficient earnings to cover a subsequent cash distribution. The court said (p. 263):

> * * * it is clear that the stock dividend of January 1, 1917, was not a distribution of profits or accretions at all, and left the accumulations of the corporation untouched and available for future disposal.

[15] Section 115 (h) of the Revenue Act of 1934, c. 277, 48 Stat. 680, provided only that:

"The distribution before January 1, 1934, in pursuance of a plan of reorganization, by or on behalf of a corporation a party to the reorganization, of its stock or securities or stock or securities in a corporation a party to the reorganization, if no gain to the distributee from the receipt of such stock or securities was recognized by law, shall not be considered a distribution of earnings or profits within the meaning of this section for the purpose of determining the taxability of subsequent distributions by the corporation. As used in this subsection, the terms "reorganization" and "party to the reorganization" shall have the meanings assigned to such terms in section 112 of the Revenue Act of 1932."

A similar provision appears as Section 203 (g) of the Revenue Acts of 1924 and 1926, and as Section 112 (h) of the Revenue Acts of 1928 and 1932.

To the same effect are *Nolde* v. *United States*, 64 C. Cls. 204, certiorari denied, 276 U. S. 634; *McCord* v. *Commissioner*, 31 B. T. A. 342; *Horrmann* v. *Commissioner*, 34 B. T. A. 1178; and *F. J. Young Corp.* v. *Commissioner*, 35 B. T. A. 860, 865, affirmed on other grounds, 103 F. 2d 137 (C. C. A. 3d); Article 115–10, Treasury Regulations 86, promulgated under the Revenue Act of 1934; cf. *Eisner* v. *Macomber*, 252 U. S. 189. *Contra* is *Patty* v. *Helvering*, 98 F. 2d 717 (C. C. A. 2d), which will be discussed *infra*.

Not only does the legislative history of Section 115 (h) indicate that its adoption was not intended as a change in existing law but merely desirable as a matter of clarity, but it also shows that Section 115 (h) means exactly what the language indicates, namely, that a stock dividend which is not taxable to the shareholder as income cannot be considered as diminishing accumulated earnings and profits for any purpose.[16]

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[16] S. Rep. No. 2156, 74th Cong., 2d Sess., p. 19 (1939–1 Cum. Bull. (Part 2), 678, 690) states with respect to Section 115 (h) as follows:

"SECTION 115 (H). EFFECT OF DISTRIBUTIONS ON EARNINGS AND PROFITS

"The rule, under existing law, with respect to the effect on corporate earnings or profits of a distribution which, under the applicable tax law, is a nontaxable stock dividend or a distribution of stock or securities in connection with a reorganization or other exchange, on which gain is not recognized in full, is that such earnings or profits are not dimin-

The three stock dividends paid by Abercrombie & Fitch Company are all of the type described in Section 115 (h) (2),[17] and under that Section they did not, for purposes of taxation, reduce its earnings and profits available for future distribution. Hence the amount of $844,100, although debited to surplus account on the company's books, remained available as earnings. After eliminating this amount from the debits to surplus account as required by Section 115 (h), Abercrombie & Fitch Company had at the very least $444,328.13 ($844,100 minus deficit of $399,771.87) of accumulated earnings which remained undistributed on January 31, 1936, even if all other charges to surplus for the period of 1913–1935 be treated as proper charges against earnings. Moreover, the

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ished by such distribution. In such cases, earnings or profits remain intact and hence available for distribution as dividends by the corporation making such distribution, or by another corporation to which the earnings or profits are transferred upon such reorganization or other exchange. This rule is stated only in part in section 115 (h) of the Revenue Act of 1934, and corresponding provisions of prior acts, but is the rule which is applied by the Treasury and supported by the courts in *Commissioner* v. *Sansome*, 60 Fed. (2) 931; *U. S.* v. *Kauffman*, 62 Fed. (2) 1045; *Murcheson* v. *Comm.*, 76 Fed. (2) 641. While making no change in the rule as applied under existing law, the recommended amendment is desirable in the interest of greater clarity."

[17] As shown above, p. 24, note 13, the 1920 stock dividend did not constitute income within the meaning of the Sixteenth Amendment to the Constitution, and the 1928 and 1930 stock dividends were exempt from taxation under Section 115 (f) of the Revenue Act of 1928.

company had net earnings of $309,073.70; after taxes for the fiscal year ended January 31, 1937, most of which were doubtless earned prior to the cash distribution in January, 1937, and were available for distribution at that time. Consequently there were undistributed earnings and profits accumulated after February 28, 1913, in excess of the total amount of $271,032.84 distributed to stockholders in the recapitalization.

The Circuit Court of Appeals ignored Section 115 (h) and the other authorities cited above and followed its own prior decisions in *Patty* v. *Helvering*, 98 F. 2d 717; *Commissioner* v. *Quackenbos*, 78 F. 2d 156; and *DeNobili Cigar Co.* v. *Commissioner*, 143 F. 2d 436. All three cases involved the question whether a redemption of stock issued as a stock dividend was made at such time and in such manner as to be essentially equivalent to the distribution of a taxable dividend within the meaning of Section 115 (g) of the Revenue Act of 1936 (Appendix A, *infra*, pp. 66–67) or the corresponding provisions of other statutes. The court held that where stock dividends were issued for a genuine business purpose, they converted earnings into capital and that a subsequent distribution in redemption of the stock issued as a stock dividend is a distribution out of capital, rather than a distribution of earnings, and is not the equivalent of a taxable dividend within the meaning of Section 115 (g). But the *Patty* and *Quackenbos*

cases arose under the Revenue Act of 1928, which did not contain any provision similar to Section 115 (h) of the Revenue Act of 1936.[18] Insofar as the decisions hold that a non-taxable stock dividend converts earnings into capital, they are in conflict with the great weight of authority on that question even prior to the enactment of Section 115 (h).[19] See *supra*, pp. 26–28. But regardless of whether or not the *Patty* and *Quackenbos* cases were correctly decided under the Revenue Act of 1928, the decisions certainly can not prevail against the statutory mandate of Section 115 (h) that a non-taxable stock dividend, regardless of when made, does not diminish earnings and profits for tax purposes. The statute, so long as it was within the power of Congress,[20] must control over decisions inconsistent therewith. See discussion in 1 Mertens, *Law of Federal Income Taxation*

[18] The *DeNobili* case did involve the Revenue Acts of 1936 and 1938. There it was held, however, that the prior stock dividends were not issued for a genuine business purpose and hence that they did not convert earnings into capital. There was, therefore, no occasion in that case to decide whether the principle of the *Patty* case should be overruled because it is contrary to Section 115 (h).

[19] The statement in the *Patty* case (pp. 718–719) that the cases of *Walker* v. *Hopkins*, 12 F. 2d 262 (C. C. A. 5th), certiorari denied, 271 U. S. 687, and *Nolde* v. *United States*, 64 C. Cls. 204, certiorari denied, 276 U. S. 634, are distinguishable because in them there was a balance of undistributed earnings after the stock dividends had been charged against them is not borne out by the facts in those cases.

[20] No claim is made that Section 115 (h) is unconstitutional.

(1942), Section 9.47, p. 490, which indicates that any question as to the correctness of the *Patty* case on this issue is now academic in view of the statute. The court below did not offer any reasons as to why Section 115 (h) does not apply here. Indeed the Section is not mentioned in the opinion, although the Tax Court had relied upon it. We submit that the Circuit Court of Appeals erred in failing to apply the Section and in failing to hold that there were earnings and profits available for distribution in January, 1937, in excess of the cash distributed at that time. It appears, moreover, that the taxpayer concedes that earnings and profits were available. (Br. in Opp. 10.)

B. *Under Section 112 (c) (2), a cash distribution not in excess of available earnings and profits has the effect of a distribution of a taxable dividend.*—As previously stated, the transaction here involved was a recapitalization and hence a reorganization. If only stock and securities had been received, the exchange would have been tax-free under Section 112 (b) (3). But cash was also received and under Section 112 (c) (1), gain from the exchange was required to be recognized in an amount not in excess of the cash. Part or all of the recognized gain, however, is to be taxed as a dividend to the extent that Section 112 (c) (2) is applicable.

Section 112 (c) (2) provides:

> If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913.

As we have shown under A, *supra*, the cash distribution did not exceed the earnings and profits of the corporation. Under those circumstances, we submit that, as the Tax Court held, Section 112 (c) (2) requires that the total recognized gain be taxed as a dividend.

Section 112 (c) (2) originated as Section 203 (d) (2) of the Revenue Act of 1924, c. 234, 43 Stat. 253. Its purpose was stated in H. Rep. No. 179, 68th Cong., 1st Sess., pp. 14–15 (1939–1 Cum. Bull. (Part 2) 241, 252), as follows:

> Section 203 (d):
>
> * * * * *
>
> (2) There is no provision of the existing law which corresponds to paragraph (2) of subdivision (d). This subdivision provides that any amount distributed by a corporation in connection with a reorganization which has the effect of a taxable divi-

dend shall be taxed as a dividend and not as a taxable gain.

The necessity for this provision may best be shown by an example: Corporation A has capital stock of $100,000, and earnings and profits accumulated since March 1, 1913, of $50,000. If it distributes the $50,000 as a dividend to its stockholders, the amount distributed will be taxed at the full surtax rates.

On the other hand, corporation A may organize corporation B, to which it transfers all its assets, the consideration for the transfer being the issuance by B of all its stock and $50,000 in cash to the stockholders of corporation A in exchange for their stock in corporation A. Under the existing law, the $50,000 distributed with the stock of corporation B would be taxed, not as a dividend, but as a capital gain, subject only to the 12½ per cent rate. The effect of such a distribution is obviously the same as if the corporation had declared out as a dividend its $50,000 earnings and profits. If dividends are to be subject to the full surtax rates, then such an amount so distributed should also be subject to the surtax rates and not to the 12½ per cent rate on capital gain. Here again this provision prevents evasions.

S. Rep. No. 398, 68th Cong., 1st Sess., p. 15 (1939–1 Cum. Bull. (Part 2) 266, 277) is similar.

The Section has been construed in numerous cases and the settled interpretation has been that

in determining what portion of the recognized gain under Section 112 (c) (1) is to be taxed as a dividend under Section 112 (c) (2), a distribution in cash made pursuant to the plan of reorganization has the effect of a distribution of a taxable dividend to the extent that it is made out of earnings and profits accumulated after February 28, 1913; or, stated another way, if prior to the reorganization the corporation had undistributed earnings and profits available for distribution in an amount of cash not in excess of these earnings, a distribution of this cash pursuant to the plan of reorganization has the same effect, and is to be treated, as a taxable dividend. See *Love* v. *Commissioner,* 113 F. 2d 236 (C. C. A. 3d); *Campbell* v. *United States,* 144 F. 2d 177 (C. C. A. 3d); *Rose* v. *Little Inv. Co.,* 86 F. 2d 50 (C. C. A. 5th); *Commissioner* v. *Owens,* 69 F. 2d 597 (C. C. A. 5th); *Commissioner* v. *Forhan R. Corp.,* 75 F. 2d 268 (C. C. A. 2d); *Hazleton Corp.* v. *Commissioner,* 36 B. T. A. 908, petition for review dismissed January 3, 1939 (C. C. A. 9th); *Woodard* v. *Commissioner,* 30 B. T. A. 1216, petition for review dismissed April 24, 1935 (C. C. A. 3d); *Henritze* v. *Commissioner,* 28 B. T. A. 1173, 1177–1178; *Woodward* v. *Commissioner,* 23 B. T. A. 1259. The foregoing cases involved exchanges of stock in one corporation for stock of another corporation and cash, but the same principle has been applied in cases where the cash distribution was received in an exchange pursuant to a re-

capitalization of a single corporation. *J. Weingarten, Inc.* v. *Commissioner,* 44 B. T. A. 798, 808–809; *Knapp Monarch Co.* v. *Commissioner,* 1 T. C. 59, 69–70, affirmed on other grounds, 139 F. 2d 863 (C. C. A. 8th); see also the alternative holding in *McCord* v. *Commissioner,* 31 B. T. A. 342, 344.

The Tax Court followed the rule of these cases in holding here that the cash distributed in the recapitalization of Abercrombie & Fitch Company is to be taxed as a dividend under Section 112 (c) (2). It found that there were earnings and profits in January, 1937, greatly in excess of the cash payment and that the distribution of the cash therefore had the effect of the distribution of a taxable dividend. The court below held that the distribution involved in this case did not have the effect of a taxable dividend under Section 112 (c) (2), not only for the reason that there were no undistributed earnings or profits, but apparently, also because the Section is to be construed as applying only to transactions which lack bona fides (R. 50–51). The view of the court seems to have been that Section 112 (c) (2) and Section 115 (g) are equivalent provisions and that Section 112 (c) (2) is to be construed as the court construed Section 115 (g) in *Patty* v. *Helvering,* 98 F. 2d 717, and *Commissioner* v. *Quackenbos,* 78 F. 2d 156. The rule applied in these cases was that a distribution in redemption of stock, previously issued as a stock

dividend is essentially equivalent to the distribution of a taxable dividend under Section 115 (g) only when the stock dividend was not issued for a bona fide business purpose, and hence the redemption was a tax avoidance device.

The precursor of Section 115 (g) was Section 201 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, which applied only to redemptions of stock previously issued as stock dividends. But Section 201 (g) of the Revenue Act of 1926 was enacted substantially in the form in which it appears in the Revenue Act of 1936. As amended, it embraces all distributions in redemption of stock, whether or not issued as a stock dividend, which are essentially equivalent to the distribution of a taxable dividend by reason of the time and manner in which made. Its purpose was to narrow the distinction between liquidating dividends and dividends paid from profits, so that a corporation might not by resorting to the device of stock redemption make a distribution to shareholders essentially resulting in a division of profits. *Hyman v. Helvering*, 71 F. 2d 342, 343–344 (App. D. C.), certiorari denied, 293 U. S. 570.[21]

[21] H. Conference Rep. No. 356, 69th Cong., 1st Sess., p. 30 (1939–1 Cum. Bull. (Part 2) 361–362), summarizes the purpose as follows:

"Amendment No. 1: It has been contended that under existing law a corporation, especially one which has only a few stockholders, might without resorting to the device of a stock dividend be able to make a distribution to its stock-

The view stated in *Patty* v. *Helvering, supra,* that Section 115 (g) applies only to redemptions of stock not issued for a genuine business purpose has been specifically disapproved by other courts. See *Vesper Co.* v. *Commissioner,* 131 F. 2d 200, 204 (C. C. A. 8th); *Hirsch* v. *Commissioner,* 124 F. 2d 24 (C. C. A. 9th); and *Smith* v. *United States,* 121 F. 2d 692 (C. C. A. 3d). Cf. *Flanagan* v. *Helvering,* 116 F. 2d 937 (App. D. C.). The rule governing the construction of Section 115 (g) followed in these cases was clearly stated in *Smith* v. *United States, supra,* pp. 695–696, as follows:

> * * * it is our opinion that the bona fides in a company's capitalization of its

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holders which would have the same effect as a taxable dividend. For example, assume that two men hold practically all the stock of a corporation for which each had paid $50,000 in cash, and the corporation had accumulated a surplus of $50,000 above its cash capital. It is claimed that under existing law the corporation could buy from the stockholders for cash one-half of the stock held by them and cancel it without making the stockholders subject to any tax, yet this action in all essentials would be the equivalent of a distribution through cash dividends of the earned surplus. Section 201 (g) of the House bill rewrites the provision of the existing law to make clear that such a transaction as above indicated is taxable. Obviously this subdivision does not apply in cases of a complete liquidation of all the stock of the corporation, or to one of a series of distributions in a complete liquidation which is bona fide carried out. This amendment provides that in the case of the cancellation or redemption of stock not issued as a stock dividend this subdivision shall apply only if the cancellation or redemption is made after January 1, 1926; and the House recedes."

earnings is immaterial to the applicability of Section 115 (g). If the stock is cancelled or redeemed "at such time and in such manner" as to make the cancellation or redemption essentially equivalent to a distribution of earnings or profits accumulated after February 28, 1913, the distribution is taxable as a dividend. Such is the express requirement of Section 115 (g) "whether or not such stock was issued as a stock dividend." The statute is aimed at the result. The basic criterion for the application of Section 115 (g) is "the net effect of the distribution rather than the motives and plans of the taxpayer or his corporation." *Flanagan* v. *Helvering*, App. D. C., 116 F. 2d 937, 939, 940.

The Tax Court also has found the rationale of the *Patty* case too broad for acceptance by it. *Levit* v. *Commissioner*, 43 B. T. A. 1077, 1084, petition for review dismissed *sub. nom. Clayburgh* v. *Commissioner*, 122 F. 2d 411 (C. C. A. 9th). See also Darrell, *Corporate Liquidations and the Federal Income Tax*, 89 U. of Pa. L. Rev. (1941) 907, 912-914, for a discussion of Section 115 (g), and footnote 43 thereof for a criticism of *Patty* v. *Helvering, supra.*[22]

[22] Indeed, Judge Learned Hand recognized that his reasoning and conclusions in *Patty* v. *Helvering*, 98 F. 2d 717, 719, were at odds with the decisions in *Hill* v. *Commissioner*, 66 F. 2d 45 (C. C. A. 4th); *Randolph* v. *Commissioner*, 76 F. 2d 472 (C. C. A. 8th); *Brown* v. *Commissioner*, 79 F. 2d 73 (C. C. A. 3d); *McGuire* v. *Commissioner*, 84 F. 2d 431 (C. C. A. 7th), certiorari denied, 299 U. S. 591; and *Parker* v. *United States*,

Thus it is far from clear that Section 115 (g) is to be applied only to transactions which lack an honest business purpose and were designed for tax avoidance, as the court below held in this case. But in any event, Section 112 (c) (2) is concerned with a wholly different problem and is not limited in its application to distributions in a reorganization which are devices for the distribution of earnings. As has been shown, *supra*, pp. 35–36, the uniform construction of the Section has been that a recognized gain arising from the distribution of money in a reorganization exchange has the effect of a taxable dividend to the extent that it is made from earnings.[23] The corporate reason for undertaking reorganization has not generally been discussed in the cases as a relevant factor. But see *Commissioner* v. *Forhan R. Corp.*, 75 F. 2d 268, 269 (C. C. A. 2d), where the court below itself said that Section 112 (c) (2) is not limited to cases where a reorganization is carried out for the purpose of avoiding high surtaxes. See also H. Rep. No. 179, 68th Cong., 1st Sess., pp. 14–15 (1939–1 Cum. Bull. (Part 2)

88 F. 2d 907 (C. C. A. 7th). To these cases may also be added *Robinson* v. *Commissioner*, 69 F. 2d 972 (C. C. A. 5th); and *Hyman* v. *Helvering*, 71 F. 2d 342 (App. D. C.), certiorari denied, 293 U. S. 570.

[23] This does not mean that Section 112 (c) (2) applies to all distributions of cash or other property pursuant to a plan of reorganization. Its application is predicated on the existence of undistributed earnings and profits accumulated after February 28, 1913.

241, 252), *supra*, pp. 33–34, which states that *any* amount distributed by a corporation in connection with a reorganization shall be taxed as a dividend if it has that effect. There is no suggestion in that report that the application of Section 112 (c) (2) was to be limited to cases where the transaction had no business purpose. Congress obviously had in mind bona fide reorganizations as in enacting other provisions with respect to reorganizations and exchanges.

Indeed, if a reorganization transaction had no business purpose but was a mere device for the distribution of an ordinary dividend with a view to avoiding full taxation thereon, the Commissioner would not be compelled to recognize the transaction as a reorganization at all (*Gregory* v. *Helvering*, 293 U. S. 465),[24] and would not be obliged to rely on Section 112 (c) (2) in taxing the distribution as a dividend. But in any case, the provisions of Section 112 (c) (2) plainly encompass distributions having the effect of taxable dividends made in a reorganization which is classified as such for tax purposes. Cf. *Helvering* v. *Credit Alliance Co.*, 316 U. S. 107. There is no logical basis, therefore, for restricting Section 112 (c) (2) to transactions lacking a business purpose.

[24] See *Wellhouse* v. *Commissioner*, 3 T. C. 363, 367–368, for an application of this principle to a transaction in form a recapitalization, but having no business purpose.

Furthermore, the phrase in Section 115 (g) which gave some color to the Circuit Court of Appeals' construction of that Section is lacking in Section 112 (c) (2). Section 112 (c) (2) is confined to distributions pursuant to a plan of reorganization but prescribes broadly within that class that all distributions in a reorganization representing recognized gain and having "the effect of the distribution of a taxable dividend" shall be "taxed" as a dividend to the extent of the stockholder's share of the "undistributed" earnings and profits. Section 115 (g) is confined to distributions in redemption of stock and is not concerned with reorganizations. It applies to stock redemptions only which are made "at such time and in such manner" as to make the distribution in whole or in part essentially equivalent to the distribution of a taxable dividend; in such event the amount so distributed shall be "treated" as a taxable dividend to the extent that it represents a distribution of "accumulated" earnings and profits. Thus Section 115 (g) prescribes that even though a liquidating distribution may be out of earnings, its equivalence to a taxable dividend depends on the *time and manner in which made*. But Section 112 (c) (2), as indicated by its terms and by its legislative history, and as construed by the courts, applies to any distribution in a reorganization if there are earnings and profits to cover it, without any limitation as to the time and

manner in which the distribution may have been made.

The Tax Court's determination that the distribution had the effect of the distribution of a taxable dividend was therefore predicated on a correct understanding of Section 112 (c) (2). If the issue, whether it had such effect, depended in any way on the time and manner of the distribution and circumstances other than the existence of earnings and profits sufficient to cover the distribution, it should be noted that the courts have frequently held that a finding, made pursuant to Section 115 (g), that a distribution is "essentially equivalent to the distribution of a taxable dividend" is one of fact.[25] On that theory the Tax Court's finding here that a distribution has the effect of the distribution of a taxable dividend would seem to be conclusive. Cf. *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231; *Commissioner* v. *Scottish American Inv. Co.*, decided by this Court, December 4, 1944. The taxpayer has pointed to no circumstances that would compel

[25] *Fox* v. *Harrison* (C. C. A. 7th), decided November 18, 1944 (1944 P-H, par. 62,777); *Vesper Co.* v. *Commissioner*, 131 F. 2d 200 (C. C. A. 8th); *Hirsch* v. *Commissioner*, 124 F. 2d 24 (C. C. A. 9th); *Smith* v. *United States*, 121 F. 2d 692 (C. C. A. 3d); *McGuire* v. *Commissioner*, 84 F. 2d 431 (C. C. A. 7th), certiorari denied, 299 U. S. 591; *Brown* v. *Commissioner*, 79 F. 2d 73 (C. C. A. 3d); *Commissioner* v. *Champion*, 78 F. 2d 513 (C. C. A. 6th); *Hyman* v. *Helvering*, 71 F. 2d 342 (App. D. C.), certiorari denied, 293 U. S. 570.

the Tax Court to find that the distribution could not have had such an effect.

To be sure, the taxpayer argued below and in the brief in opposition that the distribution had the effect, not of a taxable dividend but of a partial liquidation since the recapitalization resulted in a reduction in the capitalization of the company. It is significant that the taxpayer does not argue that the distribution was in reality a liquidating dividend to be taxed under Section 115 (c) for the reason that it realizes, as the court below evidently did not, that resort to that Section would not reduce the tax (See Argument, *infra*, pp. 54–56). It wishes to retain whatever advantages are to be obtained from treating the transaction as an exchange pursuant to a reorganization but at the same time to argue that since the capitalization of the company is reduced (see footnote 29, *infra*), the distribution had the effect of a liquidation and the Tax Court was precluded from holding that any part of the gain could be taxed as a dividend.

Neither Section 112 (c) (1) nor Section 112 (c) (2) is either apparently or logically concerned with the effect of the transaction on the capital of the company. They are concerned wholly with the profit made by the taxpayer on his own investment as the result of the exchange. The fact that his interest in the capital of the corporation may have been reduced does not limit the gain to be taxed under Section 112 (c) (1) and would seem

to be equally irrelevant in determining whether part of the profit should be taxed as a dividend.[26] But if it were relevant, it would also be pertinent to inquire what the reduction in capitalization represents and in this case it seems clear that the reduction does not exceed the non-taxable stock dividends issued in earlier years (see footnote 29, *infra*) which on the books of the company but not for tax purposes capitalized the earnings of the company. Moreover, one of the appropriate tests for determining whether a liquidating distribution is essentially equivalent to the distribution of a taxable dividend is that the corporation did not manifest any policy of contraction. *Flanagan* v. *Helvering*, 116 F. 2d 937, 939 (App. D. C.). In this case, so far as the record shows, the corporation continued as a going concern with no apparent intention to curtail its business, even

[26] We point out hereinafter why the distribution here was not a distribution in partial liquidation within the meaning of Section 115 (i). But even if it is assumed *arguendo* that the effect of the distribution could be construed as that of a partial liquidation, it would not follow that the distribution could not have the effect of a distribution of a taxable dividend. Section 115 (g) which is wholly concerned with redemptions and hence with distributions in partial liquidation recognizes that such a distribution may be the "equivalent" of the distribution of a taxable dividend as do the cases decided thereunder. This is so even though the distribution results in reduced capitalization. See, for example, *Vesper Co.* v. *Commissioner*, 131 F. 2d 200 (C. C. A. 8th); *Hirsch* v. *Commissioner*, 124 F. 2d 24 (C. C. A. 9th); cf. *Wilcox* v. *Commissioner*, 137 F. 2d 136 (C. C. A. 9th).

though its capitalization was reduced. As has been shown, *supra*, pp. 34–43, the test for determining whether a distribution has the effect of a taxable dividend under Section 112 (c) (2) is the existence of earnings and profits. But if the same criteria could be used in construing Section 112 (c) (2) as in construing Section 115 (g), the fact that the business was not curtailed would be relevant as showing that the cash distribution had the effect of a taxable dividend, rather than a partial liquidation.

The Tax Court has recognized that a distribution made in an exchange pursuant to a recapitalization, the result of which was to reduce the capitalization of the corporation, had the effect of a taxable dividend, since it was made out of earnings. *McCord* v. *Commissioner*, 31 B. T. A. 342, 344. In any case, the basic test under Section 112 (c) (2) is whether the cash given in partial exchange for the stock represented earnings. There is nothing in any of the cases indicating that the result under that Section depends on the form the reorganization takes or on the effect on the capitalization of the reorganizing corporation. There is therefore no basis for the argument that a distribution of money out of accumulated earnings does not have the effect of a taxable dividend in a situation where the capital of the corpora-

tion is reduced.[27] But in any event, if the distribution does not have the effect of the distribution of a taxable dividend but does have the effect of a distribution in partial liquidation, it should be treated as a distribution in partial liquidation. The tax effect of this treatment is discussed, *infra*, pp. 54–56.

In its brief in opposition (p. 14), the taxpayer poses the hypothetical case of a stockholder who had a loss on the transaction involved in this case and points to inequities which might result in such case if the cash distribution is held to have the effect of a dividend. We do not see how such a holding in this case could create inequities in the supposed case. The loss sustained by such a taxpayer on the exchange would not be recognized under the provisions of Section 112 (b) (3) and (e). Section 112 (c) (1) and (2) relate only to *gains* on exchanges involving other property and money. Since the taxpayer in the

[27] Taxpayer also argued below that the distribution could not have the effect of a dividend because under state law the corporation could not have paid a dividend while its books showed a deficit. This argument disregards the fact that the corporation by means of the recapitalization did effect a distribution of accumulated earnings to its preferred stockholders. Although the distribution was not in form a dividend, it had the effect of one. Cf. *Vesper Co.* v. *Commissioner*, 131 F. 2d 200 (C. C. A. 8th), in which a deficit corporation was forbidden by state law to pay dividends; nevertheless a distribution in redemption of its stock was held to be essentially equivalent to the distribution of a taxable dividend to the extent that it was made from earnings.

supposed case had a loss, Section 112 (c) (2) would not apply to him. Because he had no gain, the cash distribution would not be taxed to him as a dividend, regardless of whether or not it has the effect of a distribution of earnings and profits of the corporation to him. The taxpayer's argument overlooks the fact that it is being taxed, not on a dividend, but on a gain, which is taxed as though it had been a dividend.

Since there were earnings and profits out of which the cash distribution is deemed to have been made (see Section 115 (b), Appendix A, *infra*, p. 65) and since the bona fides of the transaction is irrelevant under Section 112 (c) (2) if earnings are available for distribution, we submit that the distribution of the cash pursuant to the plan of reorganization had the effect of and is to be taxed as a dividend.

C. *The distribution was not a partial liquidation but, even if it were, the tax would not be less than that determined by the Tax Court.*—The foregoing argument would dispose of the case if it were not for the fact that the Circuit Court of Appeals also rested its decision on an alternative theory (R. 51). This theory was that even though there were earnings and profits available for distribution, the distribution of the cash was a distribution in partial liquidation under Section 115 (c) and (i) and that it is properly chargeable to

capital account under the decision of this Court in *Foster* v. *United States*, 303 U. S. 118, rehearing denied, 303 U. S. 667. This holding seems to be the result of taxpayer's contention that the distribution had the effect of a partial liquidation. The Government's position with respect to the Court's alternative holding is (1) that there was not a partial liquidation and, in any event, that the provisions of Section 115 (i) (Appendix A, *infra*, pp. 67–68) have no application to a distribution, even though liquidating, made pursuant to a reorganization; (2) that if the transaction was a partial liquidation, the gain on the transaction, to the extent recognized, is taxable in full under Section 115 (c) regardless of the holding period; and (3) that the question decided in the *Foster* case is not presented here.

(1) The parties were in agreement before the Tax Court and the Circuit Court of Appeals that the taxability of the distribution was controlled by the provisions of Section 112 (c), since the distribution was pursuant to a plan of reorganization. The lower court's injection of Section 115 (i) into the case as determining the nature of the transaction would seem, therefore, not to be warranted. In any event, the Section does not apply to the distribution involved in this case.

In the first place, the transaction does not fall within the definition of a partial liquidation con-

tained in Section 115 (i), even if its reorganization aspect be disregarded. That Section prescribes that amounts distributed in partial liquidation mean—

> a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock.

The last part of the definition does not apply because the distribution in this case was not one of a series of distributions. The first part of the definition does not apply because the distribution in January, 1937, was not in complete cancellation of a *part* of the stock. If it was any sort of liquidating distribution, it was a complete cancellation of *all* the stock. Under the plan of recapitalization, all the old preferred stock was exchanged for new preferred, new common, and cash, and all the old common stock was exchanged for new common stock (R. 12–13). Thus the retirement extended to all classes of outstanding old stock rather than merely a part thereof. This situation is outside the definition of partial liquidation.[25] The fact that as a result of the exchange the authorized capitalization of the com-

[25] Nor was there a complete liquidation as defined in Section 115 (c) because there was no plan of liquidation. On the contrary, the intention was to continue the corporation as a going concern.

pany was reduced [29] does not alone seem sufficient to place the transaction within the definition of partial liquidation, since all, and not merely a part, of the old stock was retired and new stock of a lesser par value was substituted therefor.

Hammans v. *Commissioner,* 121 F. 2d 4 (C. C. A. 2d) cited by the court below, is distinguishable. There the company had preferred and common stock outstanding. Under a plan of exchange all the preferred stock was exchanged for common stock and cash, but the outstanding common stock was not exchanged or retired. Thus in that case there was truly a cancellation of only a part of the stock and the transaction was held to come

[29] Prior to the recapitalization the authorized stock was (R. 14, 16):

20,000 shares of preferred, par $100	$2,000,000
100,000 shares of common, no par value but having a stated value of $5	500,000
Total capitalization	2,500,000

After the reorganization the authorized stock was (R. 14):

21,000 shares of preferred, par $75	$1,575,000
100,000 shares of common, par $1	100,000
Total capitalization	1,675,000

The record does not give figures showing the issued and outstanding stock after the recapitalization although it does show that 17,973 shares of preferred and 71,800 shares of common were outstanding prior to the recapitalization (R. 12). These would have a stated value of $2,156,300. It will be recalled that the corporation had issued common stock dividends of $161,700 and preferred stock dividends of $682,400 (R. 37). The reduction in capitalization would evidently not exceed these amounts.

within the statutory definition of a partial liquidation; consequently 100% of the gain was taxed under Section 115 (c) of the Revenue Act of 1936. The transaction in the *Hammans* case was not a reorganization as in the instant case.[30]

But even if it is assumed *arguendo* that the distribution in this case falls within the statutory definition of a partial liquidation, the partial liquidation was but one of the steps in a recapitalization. The determinative factor is that the transaction, viewed as a whole, was a reorganization as defined by Section 112 (g) and the distribution in retirement of the old stock was one of the incidents of the plan of reorganization. The Tax Court so treated it and the Circuit Court of Appeals was not at liberty to single out the retirement and give separate effect to it as a partial liquidation. *Dobson* v. *Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231.

A distribution of some kind in cancellation of stock is a usual incident of every reorganization

[30] *Kelly* v. *Commissioner*, 97 F. 2d 915 (C. C. A. 2d), and *Malone* v. *Commissioner*, 128 F. 2d 967 (C. C. A. 5th), both involved a corporation which had only one class of stock. Each stockholder surrendered his stock for half as many shares of the *same* stock plus cash (and stock in another corporation in the *Kelly* case): These transactions were held to be partial liquidations as defined by statute because one half (a part) of the outstanding stock was redeemed. The cases did not involve a reorganization and they are otherwise distinguishable from the instant case. They were not cases where *all* the old stock was retired and new kinds of stock were substituted therefor as in the case at bar.

plan, but the transaction nevertheless is classified as a reorganization. It is completely immaterial that the distribution, as a result of which stock is cancelled, might literally satisfy the definition of a distribution in partial liquidation contained in Section 115 (i). Once it is determined that a distribution of money or other property is made in pursuance of a plan of reorganization, the method of taxing the distribution is fixed by Section 112 (c) (1) and (2). This Section is complete in itself and controls where a reorganization is involved. This is apparent from the decision in *Love* v. *Commissioner*, 113 F. 2d 236 (C. C. A. 3d). There, although the cash distribution made pursuant to the reorganization was referred to as a liquidating dividend, the provisions of Section 112 (c), relating to reorganizations, were applied to the exclusion of the sections dealing with distributions in liquidation. To the same effect see *Commissioner* v. *Owens*, 69 F. 2d 597 (C. C. A. 5th); *Hazleton Corp.* v. *Commissioner*, 36 B. T. A. 908, petition for review dismissed January 3, 1939 (C. C. A. 9th); *Woodard* v. *Commissioner*, 30 B. T. A. 1216, 1229, petition for review dismissed April 24, 1935 (C. C. A. 3d).[31] See also *Helver-*

[31] Cf. the statement made in *Knapp Monarch Co.* v. *Commissioner*, 1 T. C. 59, 68, affirmed on other grounds, 139 F. 2d 863 (C. C. A. 8th): "The liquidation of a corporation is not in and of itself a reorganization and standing alone the taxability of distributions in liquidation are determined under section 115 (c), and the nonrecognition provisions of section 112 are not applicable."

ing v. *Leary*, 93 F. 2d 826 (C. C. A. 4th); *Helvering* v. *Schoellkopf*, 100 F. 2d 415 (C. C. A. 2d); *Commissioner* v. *Kolb*, 100 F. 2d 920 (C. C. A. 9th); and *Commissioner* v. *Food Industries*, 101 F. 2d 748 (C. C. A. 3d), which did not involve Section 112 (c) (2), but in which it was held that a distribution, in a reorganization, of earnings accumulated after February 28, 1913, in partial cancellation of stock resulted in a taxable dividend rather than a liquidating distribution.

Thus we submit that the distribution involved in this case is to be taxed as provided in Section 112 (c), without reference to the provisions of Section 115 (c) and (i).

(2) As an alternative, if the view of the lower court that the distribution was one in partial liquidation as defined in Section 115 (i) be accepted *arguendo*, we submit that the method of taxing the distribution is determined by the provisions of Section 115 (c), and that the gain on the transaction was taxable in full under that Section.

Section 115 (c) provides in part as follows:

> * * * amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. Despite the provisions of sec-

tion 117 (a), 100 per centum of the gain so recognized shall be taken into account in computing net income, except in the case of amounts distributed in complete liquidation of a corporation.

In this case the old stock which was liquidated had a cost basis of $210,000 (R. 38). After the basis of this old stock is fully recouped out of the stock and cash, having a value of $349,740 (R. 9), given in exchange, there remains a gain on the exchange of $139,740 determined under Section 111 (Appendix A, *infra,* p. 63), which is to be recognized to the extent provided in Section 112. The general rule is stated in Section 112 (a) which provides that upon the exchange of property, the entire amount of the gain is to be recognized, except as thereinafter provided. None of the exceptions appears to apply if the transaction is viewed solely as a partial liquidation. Hence the gain would be recognized to its full extent of $139,740. But if the transaction be viewed as a reorganization as well as a liquidation, Section 112 (b) (3) and (c) (1) would apply to prevent the recognition of gain except to the extent of the cash, or $45,240. Whether the recognized gain be $139,740 or $45,240, under the express provisions of Section 115 (c) the amount taxed is not to be limited by Section 117 (a) (Appendix A, *infra,* p. 68), but 100% of the gain is to be taken into account in computing income.

Thus, under the alternative theory of the Circuit Court of Appeals, the recognized gain on the exchange, whether it be $139,740 or $45,240, must be taxed in full. The result is that the taxpayer's income under this theory will include an amount at least equal to, and possibly greater than, the gain includible as a result of taxing the distribution as a dividend under Section 112 (c) (2). The tax liability of the taxpayer is therefore not decreased in any event, if the transaction be treated as a distribution in liquidation.

The Circuit Court of Appeals failed to follow through on its alternative holding that the distribution was in partial liquidation by applying the provisions of Section 115 (c). But we submit that if the exchange in this case was a partial liquidation, or even if it had the "effect" of a partial liquidation rather than the effect of a taxable dividend as the taxpayer has argued, Section 115 (c) prescribes the rules controlling the recognition and amount of the taxable gain. Since application of this Section would not result in decreasing the amount of gain taxed, and consequently the tax liability as determined under Section 112 (c) (2), the decision of the Tax Court must be affirmed.

(3) In connection with its holding that the distribution is one in partial liquidation, the court below stated that under *Foster* v. *United States*, 303 U. S. 118, rehearing denied, 303 U. S. 667,

the cash distribution was properly chargeable to capital account, rather than to earnings and profits. In the *Foster* case, however, the question was as to the effect of a distribution in partial liquidation on earnings and profits for the purpose of determining the taxability of a later distribution. Section 115 (c) of the Revenue Act of 1928, which is substantially the same as Section 115 (c) of the Revenue Act of 1936 involved in this case provided in part:

> In the case of amounts distributed in partial liquidation * * * the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits within the meaning of subsection (b) * * * for the purpose of determining the taxability of subsequent distributions * * *[32]

Assuming *arguendo* that the distribution was one in partial liquidation and was not a distribu-

[32] The language "within the meaning of subsection (b) * * * for the purpose of determining the taxability of subsequent distributions" was deleted in Section 115 (c) of the 1936 Act. The House Ways and Means Subcommittee Report on the Revenue Bill of 1936, dated March 26, 1936, 74th Cong., 2d Sess., p. 6, states:

"LIQUIDATING DIVIDENDS.—In computing undistributed net income [for purposes of a proposed tax on undistributed income of corporations], it is recommended that the corporation be allowed a deduction for any part of liquidating dividends properly allocable to earnings and profits, but no deduction shall be given for the portion thereof properly chargeable to capital account."

It is clear therefore that the clause was deleted so that the

tion in a reorganization to be governed by the provisions of Section 112 (c) (2), we submit that it is immaterial to what account the distribution should be charged on the company's books. So narrowed, the case involves only the question of the amount of the gain upon the liquidating distribution which is to be taxed to the taxpayer as a stockholder, as provided in Section 115 (c). Its gain is represented by the excess of the amount it received, in stock and cash, on the exchange over its basis for the stock surrendered. This gain is taxable income because the capital investment or basis for the stock surrendered has been recovered, irrespective of whether the corporation charges the liquidating distribution to earnings and profits or to capital account.[33] The manner in which the corporation accounts for the distribution can not affect the amount of gain realized by a stockholder. See Sections 115 (c), 111, and 112, and *Hellmich* v. *Hellman*, 276 U. S. 233.

Even if the question were presented in this case as to whether the distribution was chargeable to

---

Section would comprehend the situation in the quoted language, as well as situations involving the taxability of subsequent distributions. The change did not affect the method of taxing the stockholder on the liquidating dividend itself as prescribed in preceding sentences of Section 115 (c) of both statutes.

[33] The amount of the corporation's earnings and profits is material in this case only as determining whether the cash distribution had the effect of a taxable dividend under Section 112 (c) (2).

capital or earnings, the case of *Foster* v. *United States,* 303 U. S. 118, would not in any event be applicable. That case involved a corporation which had earnings accumulated prior to March 1, 1913,[34] and earnings accumulated subsequent thereto. The question was whether a distribution in retirement of stock was properly chargeable to pre-1913 earnings or post-1913 earnings for the purpose of determining whether a subsequent distribution was a dividend paid out of accumulated earnings or a return of capital. The opinion specifically limits its scope to "stock purchases of the type" there involved (p. 122) and does not purport to lay down a general rule that all distributions in partial liquidation are properly chargeable to capital account. See *Helvering* v. *Jarvis,* 123 F. 2d 742 (C. C. A. 4th). The lower court therefore misinterpreted the *Foster* decision in holding (R. 51) that it states a general rule in this respect. Cf. *Helvering* v. *Credit Alliance Co.,* 316 U. S. 107. In the instant case there are no issues with respect to whether the liquidating distribution is chargeable to pre-1913 earnings or post-1913 earnings or as to the effect of the distribution on the taxability of subsequent distributions by the corporation. The *Foster* case is

[34] The "capital account" is generally understood to include earnings accumulated prior to March 1, 1913, in addition to capital stock. *Helvering* v. *Credit Alliance Co.,* 316 U. S. 107, 111.

consequently not apposite to the factual situation in this case.

Since it is irrelevant to the issues before the Court, it is not deemed necessary to discuss whether the cash distribution, if it is held to be a distribution in partial liquidation, is properly chargeable to earnings and profits or capital account. It is enough that, under Section 115 (c), the taxpayer, receiving a distribution in partial liquidation, is taxable on 100% of the resulting gain.

CONCLUSION

The judgment of the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
HELEN R. CARLOSS,
HELEN GOODNER,
Special Assistants to the Attorney General.

FEBRUARY 1945.

APPENDIX A

1. *Authorities on the Jurisdictional Question*

Act of February 13, 1925, c. 229, 43 Stat. 936:

> SEC. 8. (a) That no writ of error, appeal, or writ of certiorari, intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judgment or decree, excepting that writs of certiorari to the Supreme Court of the Philippine Islands may be granted where application therefor is made within six months: *Provided,* That for good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court.
>
> * * * * * *

(28 U. S. C. 350.)

Rules of the United States Circuit Court of Appeals for the Second Circuit:

> Rule 30. *Taxing Costs—Order—Mandate.*
>
> 1. Upon the filing of any decision by this court the clerk shall forthwith, or at any later time, if the court thinks justice requires it, enter the proper order, and will thereupon prepare and tax the bill of costs, giving to the parties reasonable time to file with him their proposed orders and bill of

costs, with proof of service of the same upon their opponents.

2. A mandate may issue at any time on order of this court, but unless otherwise ordered shall issue at the expiration of fifteen days from the filing of the opinion of this court in the clerk's office unless delayed by the filing of the petition for rehearing.

3. If application for certiorari from the Supreme Court be made, application to stay the mandate pending such certiorari shall be made only to this court, except in vacation when such application may be made to any judge of this court. During recesses, any judge of this court may grant an order to show cause (with stay) why the issuance of mandate should not be withheld, making however, such order to show cause returnable at the next motion day of this court.

If a stay be granted, it shall not be for more than 30 days, at which time the stay shall expire and the mandate issue forthwith.

Provided that if within 30 days there is filed with the clerk of this court the certificate of the clerk of the Supreme Court of the United States that the certiorari petition, record and briefs have been filed, and proof by affidavit of notice thereof under paragraph 3 of Rule 38 of the Supreme Court thereupon the stay shall continue until the final disposition of the case by the Supreme Court. Immediately upon the filing of a copy of an order denying the writ, the clerk of this court shall issue the mandate.

2. *Statutes and Regulations Involved in the Question on the Merits*

Revenue Act of 1936, c. 690, 49 Stat. 1648:

SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.

(a) *Computation of Gain or Loss.*—The gain from the sale or other disposition of property shall be the excess of the amount realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount Realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

(c) *Recognition of Gain or Loss.*—In the case of a sale or exchange, the extent to which the gain or loss determined under this section shall be recognized for the purposes of this title, shall be determined under the provisions of section 112.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General Rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges Solely in Kind.*—

* * * * * *

(3) *Stock for stock on reorganization.*—No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the

plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

* * * * *

(c) *Gain from Exchanges not Solely in Kind.*—

(1) If an exchange would be within the provisions of subsection (b) (1), (2), (3), or (5) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(2) If a distribution made in pursuance of a plan of reorganization is within the provisions of paragraph (1) of this subsection but has the effect of the distribution of a taxable dividend, then there shall be taxed as a dividend to each distributee such an amount of the gain recognized under paragraph (1) as is not in excess of his ratable share of the undistributed earnings and profits of the corporation accumulated after February 28, 1913. The remainder, if any, of the gain recognized under paragraph (1) shall be taxed as a gain from the exchange of property.

* * * * *

(g) *Definition of Reorganization.*—As used in this section and section 113—

(1) [As amended by Sec. 213 (g) (1) of the Revenue Act of 1939, c. 247, 53 Stat. 863, 871] The term "reorganization" means

* * * or (D) a recapitalization, or (E) a mere change in identity, form, or place of organization, however effected.

* * * * * *

SEC. 115. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of Dividend.*—The term "dividend" when used in this title (except in section 203 (a) (3) and section 207 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made.

(b) *Source of Distributions.*—For the purposes of this Act every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. Any earnings or profits accumulated, or increase in value of property accrued, before March 1, 1913, may be distributed exempt from tax after the earnings and profits accumulated after February 28, 1913, have been distributed, but any such tax-free distribution shall be applied against and reduce the adjusted basis of the stock provided in section 113.

(c) [As amended by Sec. 205 of the Revenue Act of 1937, c. 815, 50 Stat. 813] *Distributions in Liquidation.*—Amounts distributed in complete liquidation of a corporation shall be treated as in full pay-

ment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. Despite the provisions of section 117 (a), 100 per centum of the gain so recognized shall be taken into account in computing net income, except in the case of amounts distributed in complete liquidation of a corporation. For the purpose of the preceding sentence, "complete liquidation" includes any one of a series of distributions made by a corporation in complete cancellation or redemption of all of its stock in accordance with a bona fide plan of liquidation and under which the transfer of the property under the liquidation is to be completed within a time specified in the plan, not exceeding two years from the close of the taxable year during which is made the first of the series of distributions under the plan. In the case of amounts distributed (whether before January 1, 1934, or on or after such date) in partial liquidation (other than a distribution within the provisions of subsection (h) of this section of stock or securities in connection with a reorganization) the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits. * * *

* * * * *

(g) *Redemption of Stock.*—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock div-

idend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

(h) *Effect on Earnings and Profits of Distributions of Stock.*—The distribution (whether before January 1, 1936, or on or after such date) to a distributee by or on behalf of a corporation of its stock or securities or stock or securities in another corporation shall not be considered a distribution of earnings or profits of any corporation—

(1) if no gain to such distributee from the receipt of such stock or securities was recognized by law, or

(2) if the distribution was not subject to tax in the hands of such distributee because it did not constitute income to him within the meaning of the Sixteenth Amendment to the Constitution or because exempt to him under section 115 (f) of the Revenue Act of 1934 or a corresponding provision of a prior Revenue Act.

As used in this subsection the term "stock or securities" includes rights to acquire stock or securities.

(i) *Definition of Partial Liquidation.*—As used in this section the term "amounts distributed in partial liquidation" means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in

complete cancellation or redemption of all or a portion of its stock.

* * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

* * * * *

Treasury Regulations 94, promulgated under the Revenue Act of 1936:

ART. 115–11. *Effect on earnings or profits on certain tax-free exchanges and tax-free distributions.*—If, under the law applicable to the year in which any transfer or exchange of property after February 28, 1913, was made (including transfers in connection with a reorganization or a complete liquidation under section 112 (b) (6) and inter-company transfers of property during a period of affiliation), gain or loss was not recognized (or was recognized only to the extent of the property received other than that permitted by such law to be re-

ceived without the recognition of gain), then proper adjustment and allocation of the earnings or profits of the transferor shall be made as between the transferor and transferee corporations.

The general rule provided in section 115 (b) that every distribution is made out of earnings or profits to the extent thereof and from the most recently accumulated earnings or profits, does not apply to:

(1) The distribution, in pursuance of a plan of reorganization, by or on behalf of a corporation a party to the reorganization, to its shareholders of stock or securities in such corporation or in another corporation a party to the reorganization—

(A) in any taxable year beginning before January 1, 1934, without the surrender by the distributees of stock or securities in such corporation (see section 112 (g) of the Revenue Act of 1932); or

(B) in any taxable year (beginning before January 1, 1936, or on or after such date) in exchange for its stock or securities (see section 112 (b) (3))

if no gain to the distributees from the receipt of such stock or securities was recognized by law.

(2) A stock dividend which was not subject to tax in the hands of the distributee because either it did not constitute income to him within the meaning of the sixteenth amendment to the Constitution or because exempt to him under section 115 (f) of the Revenue Act of 1934 or a corresponding provision of a prior Revenue Act.

A distribution described in paragraphs (1) and (2) above does not diminish the earnings or profits of any corporation. In such

cases, the earnings or profits remain intact and available for distribution as dividends by the corporation making such distribution, or by another corporation to which the earnings or profits are transferred upon such reorganization or other exchange.

For the purposes of this article, the terms "reorganization" and "party to the reorganization" shall, for any taxable year beginning before January 1, 1934, have the meanings assigned to such terms in section 112 of the Revenue Act of 1932, and for any taxable year beginning after December 31, 1933, and before January 1, 1936, have the meanings assigned to such terms in section 112 of the Revenue Act of 1934.

APPENDIX B

1. *Letter from taxpayer's counsel to the Clerk of the Circuit Court of Appeals for the Second Circuit, dated January 15, 1945*

HOLT S. MCKINNEY
Counsellor at Law
120 Broadway
NEW YORK CITY

JANUARY 15th, 1945.

HONORABLE ALEXANDER M. BELL, *Clerk,*
United States Circuit Court of Appeals
Second Circuit, U. S. Courthouse,
Foley Square, New York 7, N. Y.

Re—*Estate of Edward T. Bedford, Title Guarantee & Trust Co., Executor* v. *Commissioner of Internal Revenue*

DEAR MR. BELL: According to the docket entries in the above-entitled case, an Order for Mandate was issued by the Circuit Court of Appeals, Second Circuit, in this case on August 29, 1944.

May we respectfully inquire whether said Order for Mandate was entered pursuant to an express direction of the Court, or was it entered by the Clerk pursuant to Rule 30, paragraph 2, of the Rules of the United States Circuit Court of Appeals for the Second Circuit, without further action or order by the Court.

May we also inquire whether said Order for Mandate, issued on August 29, 1944, is entered in any bound record of the Court, or is it simply contained on a loose sheet of paper kept in a filing cabinet along with other papers and correspondence relating to the case.

Your advice regarding the above will be greatly appreciated.

Respectfully,

(Sgd.) H. S. McKinney.

HSM:MBH

2. *Letter from the Clerk to taxpayer's counsel, dated January 15, 1945*

January 15th, 1945.

Holt S. McKinney, Esq.
120 Broadway
New York, N. Y.

Estate of Bedford, et al. v. *Commissioner of Internal Revenue*

Dear Mr. McKinney: In reply to yours of the 15th inst., the order for mandate in the above-entitled case was entered by the Clerk under Rule 30, paragraph 2, on August 29, 1944.

The order for mandate was made on a printed form order for mandate of legal cap size and filed together with the other papers in this case. A copy is made and kept in the permanent minute book of this Court.

Respectfully,

Alexander M. Bell,
Clerk.

3. *Letter from the Solicitor General to the Clerk, dated January 20, 1945*

JANUARY 20, 1945.

A. M. BELL, Esq.
Clerk, U. S. Circuit Court of
Appeals for the Second Circuit
New York, New York

Re: *Estate of Edward T. Bedford, Title Guarantee and Trust Company, Executor* v. *Commissioner of Internal Revenue*

DEAR MR. BELL: On August 8, 1944, the Circuit Court of Appeals for the Second Circuit filed its opinion and on August 29, 1944, entered its Order for Mandate in the above case. On November 29, 1944, the Government filed a petition for certiorari with the Supreme Court on behalf of the Government.

The brief in opposition to the petition filed by the executor raises the question whether the petition was filed within three months after entry of judgment. In view of Rule 30 of the Second Circuit requiring that an appropriate order be entered "forthwith" following the decision of a case, it is contended that the Clerk's entry of August 8, following the filing of the opinion, constituted the judgment.

On January 8, 1945, the Supreme Court granted certiorari, but requested the parties to discuss in their briefs and on oral argument the question whether the application for certiorari was within the time provided by law.

In presenting to the Supreme Court the merits of the question which has been raised, it would

be very helpful to receive any information you may be able to send me concerning the practice in the Second Circuit and the understanding with regard to what constitutes the court's judgment, in addition to that which appears in the brief in opposition which raised the question. I am enclosing a copy of this brief for your information.

Sincerely yours,

CHARLES FAHY,
Solicitor General.

cc-Erwin N. Griswold, Esq.,
c/o Holt S. McKinney,
122 E. 42nd Street,
New York City, N. Y.

4. *Letter from the Clerk to the Solicitor General, dated January 23, 1945*

UNITED STATES CIRCUIT COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
NEW YORK 7

Alexander M. Bell, Clerk.

JANUARY 23, 1945.

Hon. CHARLES FAHY,
Solicitor General,
Washington, D. C.

Estate of Bedford, etc. v. *Commissioner*

DEAR MR. FAHY: In reply to yours of the 20th inst., regarding the timeliness of the filing of the petition for a writ of certiorari herein, I set forth below the helpful information you seek. I have

answered each paragraph of the respondent's brief, beginning with page 4 to and including page 9.

The court's opinion was handed down on August 8, 1944.

The order for mandate which is the judgment of this court was entered on August 29, 1944. The mandate was issued on August 29, 1944.

The petition for a writ of certiorari was filed on time, as the judgment of this court was entered on August 29, 1944. The order for mandate was the judgment of this court as a reading of the order clearly discloses. ("* * * it is *now* hereby ordered, adjudged, and decreed that the order of said The Tax Court of the United States be and it hereby is reversed.") No prior action of this court was its judgment. Surely, it cannot be contended that the opinion of this court is the judgment.

The docket entry made on August 8, 1944, is identical to that made in all cases (recording of the opinion) when the decision is rendered, whether the court or judge writing concludes the opinion with the words "is reversed", "should be reversed", or what have you. The entry is made briefly to indicate when this court decided the case what this court did to the lower court's judgment and who wrote the opinion. The argument made that the court entered the judgment on August 8, 1944, by concluding its opinion with the words "The order of The Tax Court is reversed" is negated by the rules of and by the practice in this court, and by the wording of the opinion in the first paragraph thereof: "We think the de-

cision of The Tax Court adjudging a deficiency of $13,887.24 *should be* reversed."

The paper filed on August 29, 1944, is the judgment of this court despite that it is called the order for mandate. It is so called because all judgments on decisions of all appeals from lower courts contain a paragraph ordering the issuance of a mandate. Its function is not alone to order the issuance of a mandate. That is its secondary purpose as a reading of the paragraph ordering the issuance of the mandate shows: "It is *further* ordered that a Mandate issue to the said The Tax Court of the United States in accordance with this *decree.*" The paper called order for mandate recites that it is the decree of this court.

The characterization of the order for mandate or judgment or decree as a loose sheet of paper is at best a misleading statement. I enclose herewith a copy of a letter from Mr. McKinney relating thereto and mine in answer. The order for mandate in any case is kept with the original papers in that case, which include the original record, the original opinion, stipulations, etc., but no correspondence. An opinion of the court written on a single sheet of paper wouldn't be characterized as a loose sheet of paper. The Clerk of this court does not enter judgments at what he considers to be a convenient time. Judgments are entered here under Rule 30, paragraph 1. By the court's instruction judgments are entered at the expiration of fifteen days from the filing of the opinion. The entry of the order or judgment is not a mere ministerial act. The court has delegated its power to do so to the Clerk. The Deputy Clerk is empowered to act

for the Clerk in his absence, and such was the case here when the Clerk was away for a few days. The docket entry of August 8, 1944, was a recording of the opinion.

No judgments are entered forthwith in this court, except by direct instruction of the court. On the contrary, the Clerk has been instructed by the court to enter judgments at the expiration of fifteen days from the handing down of opinions. No order was entered here on August 8, 1944. Rule 30 of this court, together with the court's directions thereunder is not similar to the last sentence in Rule 58 of the Rules of Civil Procedure, because it is not meant to be.—

No contrast can be made between "forthwith" in paragraph 1 and "fifteen days" in paragraph 2 of Rule 30, because the court for some time past has thought that justice requires the judgment to be entered at the expiration of fifteen days from the date of the opinion.

Under paragraph 3 of Rule 30, the issuance of a mandate is stayed and not the entry of the order for mandate. In such cases, orders for mandate are and must be entered, otherwise there would be no judgment to review by petition for writ of certiorari. No record can be or ever is certified for use in petitioning for a writ unless the order for mandate is entered. The order for mandate is entirely different from the mandate and the two are not to be confused.

It is not a carelessly accepted notion that the order for mandate constitutes the judgment. On the contrary it has always been the expressed intent that it be the judgment.

The period for review of this court's decisions is not different from any of the other circuit courts of appeals. The period is the same; three months from the entry of the judgment of the court. The Department of Banking v. Pink case ~~is not at all similar to the problem here. There courts of appeals. The period is the same; three~~ no question here as to an entry of an order on mandate (same as state court remittitur) by the district court.

The judgment is not entered here at the convenience of the Clerk or his Deputy, but at the time as generally directed by the court.

Sincerely yours,

(Sgd.) ALEXANDER M. BELL,
Alexander M. Bell, *Clerk.*

5. *Letter from taxpayer's counsel to the Clerk, dated January 29, 1945*

HUNT, HILL & BETTS
Counsellors at Law—Proctors in Admiralty
Equitable Building
120 Broadway
NEW YORK 5

JANUARY 29, 1945.

HON. ALEXANDER M. BELL, *Clerk,*
United States Circuit Court of Appeals,
Second Circuit, U. S. Courthouse,
Foley Square, New York 7, N. Y.

DEAR MR. BELL: In connection with the case of *Commissioner of Internal Revenue* v. *Estate of Edward T. Bedford*, now pending before the Supreme Court, and your letter of January 23, 1945,

to the Solicitor General, will you please give me the answers to the following questions:

1. Has the Circuit Court of Appeals for the Second Circuit, by any sort of formal order, declared or ordered that it is its conclusion that justice requires that in all cases the judgment be entered at the expiration of fifteen days from the date of the opinion? If so, where is that order recorded, and what is its date and text?

2. In the eighth paragraph of your letter to the Solicitor General, you state that "the Clerk has been instructed by the court to enter judgments at the expiration of fifteen days from the handing down of opinions". Will you please state the date and text and place of recording of any such instructions, or any other basis there may be for the statement in your letter?

3. If there were such instructions, why were they not complied with in this case? I call your attention to the fact that the opinion was filed and docket entry was made in this case on August 8, 1944; while the order for mandate was entered on August 29, 1944, a period of twenty-one days. In the case of *International Standard Electric Corp.* v. *Commissioner*, now pending before the Supreme Court, the period was twenty-nine days.

4. In the case of *Estate of Edward T. Bedford* v. *Commissioner*, in which the opinion was filed in your court on August 8, 1944, did the court itself, meaning the judges thereof, or any of them, by any formal action of any sort, make or sign or initial any order or take any action in connection with the case after August 8, 1944, and on or before August 29, 1944? In particular, was the order for mandate, entered on August

29, 1944, entered pursuant to any specific order of the court made with reference to that case? If so, where is such order filed or recorded, and what judge or judges made it, and on what day?

These questions have been prepared carefully and specifically, and we would appreciate specific answers, without argument, to the questions as we have put them.

Respectfully,

(Sgd.) H. S. McKinney.

HSM: MBH

6. *Letter from the Clerk to taxpayer's counsel, dated January 31, 1945*

UNITED STATES CIRCUIT COURT OF APPEALS
Second Circuit
United States Courthouse
Foley Square
NEW YORK 7

JANUARY 31, 1945.

HOLT S. McKINNEY, Esq.,
120 Broadway, New York, N. Y.

DEAR MR. McKINNEY: In reply to yours of the 29th inst., orders for mandate are entered and mandates issued in conformity with the rules of this court.

At the expiration of fifteen days from the filing of the opinion of this Court, a bill for entering the order and issuing the mandate was mailed to you. These services were rendered when the bill was paid. The same is true of *International Standard Electric Corporation* v. *Commissioner*.

Very truly yours,

(signed) ALEXANDER M. BELL, *Clerk*.

7. Letter from taxpayer's counsel to the Clerk, dated February 3, 1945

FEBRUARY 3, 1945.

Hon. ALEXANDER M. BELL, *Clerk,*
United States Circuit Court of Appeals,
Second Circuit, U. S. Courthouse,
Foley Square, New York 7, N. Y.

DEAR MR. BELL: I have your letter of January 31, 1945, in connection with the case of *Commissioner of Internal Revenue* v. *Estate of T. Bedford,* now pending before the Supreme Court. But since you did not include in your letter of January 31st the answers to the specific questions we asked in our letter of January 29th, will you kindly advise us if we are correct in assuming:

1. The Circuit Court of Appeals for the Second Circuit *has not,* by any sort of formal order, declared or ordered that it is its conclusion that justice requires that in all cases the judgment be entered at the expiration of fifteen days from the date of the opinion.

2. That the only instructions to the Clerk by the court to enter judgments at the expiration of fifteen days from the handing down of opinions is that contained in rule 30, paragraph 2, of the rules of the United States Circuit Court of Appeals for the Second Circuit.

3. That the Order for Mandate in the instant case, and in the case of the *International Standard Electrical Corporation* v. *Commissioner* now on appeal to the Supreme Court, was entered by the Clerk of said Court when the respective bills for services were paid and that the entry of said

order in each case was made dependent upon the payment of the bill for services.

4. In the case of *Estate of Edward T. Bedford* v. *Commissioner,* in which the opinion was filed in your Court on August 8, 1944, the Court itself, meaning the judges thereof, or any of them, *did not* by any formal action of any sort, make or sign or initial any order or take any action in connection with the case after August 8, 1944, and on or before August 29, 1944.

5. The Order for Mandate, entered on August 29, 1944, in the above-mentioned case of *Estate of Edward T. Bedford* v. *Commissioner,* was not entered pursuant to any specific order of the Court made with reference to that case.

Your further advice regarding the above will be greatly appreciated.

Respectfully,

H. S. McKinney.

HSM: MBH

Copy to Hon. Charles Fahy, Solicitor General.

8. *Letter from the Clerk to taxpayer's counsel, dated February 6, 1945*

UNITED STATES CIRCUIT COURT OF APPEALS

Second Circuit

United States Courthouse

Foley Square

NEW YORK 7

FEBRUARY 6, 1945.

HOLT S. MCKINNEY, Esq.
120 Broadway, New York City.

Commissioner v. *Bedford*

DEAR MR. MCKINNEY: In reply to yours of the 3rd inst., the court some time back directed the present clerk's predecessors in office to enter judgment at the expiration of fifteen days. The fifteen-day period affords counsel for the losing party an opportunity to file a petition for rehearing.

Very truly yours,
(signed) ALEXANDER M. BELL, *Clerk*.

APPENDIX C

1. *Sample of letter mailed to the Clerk of each Circuit Court of Appeals with the exception of the Clerk of the Second Circuit*

JANUARY 17, 1945.

JOSEPH W. STEWART, ESQ.,
Clerk, U. S. Court of Appeals
for the District of Columbia,
Washington, D. C.

DEAR MR. STEWART: A question has arisen in a proceeding before the Supreme Court as to the precise time when judgment is considered to have been entered under the practice in one of the Circuit Courts of Appeals. For comparative purposes and for the information of the Court on argument, I would be pleased to receive from you a detailed statement as to the practice in your Court with respect to the entry of judgment orders. It would be helpful if this statement would cover the following questions:

1. Does the Court sign the opinion?
2. What entry is made to record the filing of the opinion?
3. Is any separate order entered that is labeled a judgment?
4. Is the Order for Mandate made pursuant to any express direction of the Court and is it entered in any bound record of the Court?
5. Is there any time requirement for 3 or 4 with relation to the date of the opinion, or in relation to each other?

6. Does the Court sign the order for Mandate or any other order after the filing of the opinion?

Your prompt reply will be greatly appreciated.

Yours sincerely,

CHARLES FAHY,
Solicitor General.

2. *Summary of the practice in the Court of Appeals for the District of Columbia and the Circuit Courts of Appeals, as taken from the reply of the Clerk of each court to the above letter:*

United States Court of Appeals for the District of Columbia

Upon the filing of an opinion, the Clerk prepares a separate judgment order which is signed by the judge who wrote the opinion and is entered on the docket and journal on the date of the filing of the opinion, as required by Rule 25 of the rules of the court. It is not the practice to enter an order for mandate, since Rule 27 providing for issuance of mandates is self-executing.

Circuit Court of Appeals for the First Circuit

A formal judgment is entered in each case on the date the opinion is delivered, as provided in Rule 31, paragraph 3, of the rules of the court. The judgment is signed by the Clerk of the Court but is examined and initialed by the Senior Circuit Judge. Mandates are issued as of course under Rule 35, paragraph 1, and it is not the usual practice to enter orders for mandates.

Circuit Court of Appeals for the Third Circuit

Upon filing of an opinion a separate judgment order is prepared by the Clerk and signed by one of the judges who sat in the case. This judgment is ordinarily filed as of the same date as the opinion. The mandate issues as a matter of course under the rules without an order as provided in Rule 38 of the court's rules, except that an order for mandate signed by the court is filed if the mandate is issued in advance of the time provided by the rule.

Circuit Court of Appeals for the Fourth Circuit

After the opinion in a case is filed, a separate order, labeled judgment, decree, or order, is signed by the judge who prepared the opinion, or if the judges are not in session it is signed by all judges who sat in the case. The judgment is usually, although not always, filed and entered on the date on which the opinion is filed, and is recorded in full on the minutes of the court. It is considered that judgment is entered on the date of the filing of the judgment in the Clerk's office. Under Rule 22 of the court's rules mandates issue as of course, and in the absence of rehearing, certiorari, or other special circumstances, it is not the practice to enter orders for mandates.

Circuit Court of Appeals for the Fifth Circuit

On the date the opinion is filed, the judgment of the court, which is called the judgment in the case, is drawn up in accordance with the opinion and is entered on the minutes. Mandates are

issued as provided in Rule 32 of the court's rules without entry of an order for mandate.

Circuit Court of Appeals for the Sixth Circuit

A separate order, labeled a judgment, is signed by the judge who wrote the opinion and is entered on the docket on the same date as the date of the opinion. No orders for mandates are made but the mandate is issued at the time provided by Rule 30 of the court's rules.

Circuit Court of Appeals for the Seventh Circuit

A separate order labeled a judgment is entered in the journal on the same date as that on which the opinion is filed (pursuant to Rule 20 of the court's rules), except in N. L. R. B. and F. T. C. cases in which formal decrees are entered (pursuant to Rule 34 (9)). No order for mandate is entered, but the mandate issues under Rule 25 without an order.

Circuit Court of Appeals for the Eighth Circuit

When an opinion has been filed with the Clerk, he enters a separate judgment or decree as required by the opinion, without submitting the form of the judgment to the court. Such judgment is usually entered at the time of filing the opinion and Rule 14 (b) of the court's rules provides that when the judgment is entered in conformity with the opinion it is the judgment and decree of the court. Mandates are issued by the Clerk as provided in Rule 16 without express direction by the court.

Circuit Court of Appeals for the Ninth Circuit

Upon the filing of an opinion a formal judgment is entered in accordance with the opinion in the minutes of the court, and is filed with the papers in the case. (Note that Rule 3, subdivision 5, of the rules of the court provides: "Appeals shall be deemed decided when announced from the bench in a session of the court at the place of the term in which they are submitted, or when the signed opinions or other documents evidencing their decision are filed with the clerk.") The mandate issues as of course without order agreeably to the provisions of Rule 28.

Circuit Court of Appeals for the Tenth Circuit

As soon as an opinion is filed and entered in the docket book, the Clerk draws up the judgment or decree directed by the opinion and copies it in the permanent record of the orders and judgments of the court. Rule 27 (3) of the court's rules provides that such judgment or decree, when so entered in conformity with the opinion, shall be the judgment and decree of the court. The judgment is always entered on the same day the opinion is filed, unless otherwise directed by the court. (Special decrees which are signed by the court are made in cases involving enforcement of decrees or orders of administrative agencies, boards or commissions, pursuant to Rule 34 (9).) Mandates issue under Rule 28 as provided therein and no order is ordinarily made with respect to the issuance of the mandate.

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